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ABSTRACT

Contrary to popular perception, the agricultural workplace presents many hazards. Yet children are allowed to work on farms at an age when they are likely to lack the training, skill, or maturity to handle these functions safely. This study of child labor in agriculture is divided into seven parts. Following an introductory section, part 2 provides a demographic snapshot of both the farmworker population as a whole and farmworkers under age 18. Analysis highlights the strengths and weaknesses of available databases. The third part describes the work performed by children in agriculture. The fourth part analyzes the risk factors child workers face for fatal and nonfatal injuries. General studies that encompass all farmworkers are also taken into account. Another set of studies examines injuries to all children who live and work on farms. These data, too, are analyzed for the light they shed on hired child workers. The fifth part describes federal and state child labor laws regulating agricultural employment. A limited discussion is included of laws of general applicability, which could be used to reduce the hazards to children working in agriculture. The sixth part sets forth 20 recommendations for enhanced legal protections. (Contains 90 references.) (TD)

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THE ONES THE LAW FORGOT: CHILDREN WORKING IN AGRICULTURE

By Shelley Davis and James B. Leonard[1]

I. INTRODUCTION

This study reports on the health hazards facing children working in agriculture and the inadequacy of existing laws to protect them. Farm work, for many years, has been one of the three most dangerous occupations in the United States. Exposure to pesticides and other toxic chemicals, transportation accidents, tractor rollovers, unguarded farm machines, open irrigation ditches, and animals pose some of the most significant hazards in the agricultural workplace.

Although there has been increased mechanization, agricultural work retains a substantial component of repetitive manual labor. This is often done in stooping, squatting or other awkward positions. As a result, even young agricultural laborers suffer from musculoskeletal injuries that can be serious or disabling, and these conditions only worsen after decades of work. On a daily basis farm work is frequently a cause of sprains, strains, lacerations, fractures and other injuries to young workers. Many agricultural tasks, from hand-harvesting to hoeing, pruning, or sorting, are akin to assembly line work in a factory. As such, farms, in the evocative phrase of Carey McWilliams, have truly become factories in the field.

The popular culture paints a distinctly different picture of agriculture. From many sources ranging from the writings of Thomas Jefferson to the poetry of Henry Wadsworth Longfellow and John Greenleaf Whittier to the paintings of the Hudson River School, Winslow Homer, and other landscape artists, life on the farm has been portrayed as the bedrock of wholesome America – honest and safe labor carried out within the bosom of a loving family, surrounded by generous neighbors (Burns, 1989). This image bears little relation to the life of migrant farmworkers on farms today. The increasing size and mechanization of farms, often owned by distant corporations; the rise in the use of crewleaders and hired farmworkers from foreign lands; and the pressure of international competition all contribute to making agriculture today a complex and hazardous work environment, far different from the idealized image that is so deeply etched in the American psyche.

To the extent permitted by the available data, this study focuses on agricultural workers under the age of 18. This age was selected because once individuals reach the age of 18 they are considered to be adults for most legal purposes. They can vote, enlist in military service, enter into binding contracts and do most things that are reserved for

[1] In the preparation of this paper, we have been greatly assisted by Catherine de Gaston, a student at Brigham Young University Law School, and Chris Ann Keehner, a graduate of the Washington College of Law at American University.

RC 023726

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adults, except for purchasing alcoholic beverages. Most significantly, the child labor laws do not provide any special protections for workers once they reach the age of 18 or above. Throughout this paper, for simplicity of reference, the terms "children," "youth," or "young workers" are used to mean workers under age 18, unless otherwise indicated.

This study is also restricted to work done on farms or in greenhouses or nurseries which is of an agricultural nature. It excludes construction or electrical work done on farms because work of this type does not illuminate the hazards inherent in agricultural work. Work done off the farm, with one important exception, is not included in this study. The sole exception is driving and riding in vehicles in order to transport farmworkers to and from agricultural jobs. This activity, even though it occurs off the farm, is very closely related to work on the farm, and gives rise to such a significant number of deaths and injuries, that to exclude it would provide an erroneous impression of the agricultural work environment as it is experienced by those who work there. Many databases of deaths and accidents on the farm, however, exclude accidents on highways, even though the accidents involve farmworkers who were going to or from agricultural jobs. This approach has the effect of substantially undercounting the number of farm-related accidents.

The farm is frequently also a place where people live and engage in leisure activities. Those who live on the farm can include farm owners or operators and their children, as well as hired farm laborers and their children. The children of the owners, operators or farmworkers may or may not do farm work, and may or may not be paid for work they do. These characteristics of farm life complicate the analysis of injuries to children working in agriculture for a number of reasons. For example, to determine a rate of injury it is important to know the total number of child workers and which deaths or injuries are to be counted. Different sources answer these questions in a disparate fashion: some count all deaths or injuries to children who live or work on the farm, whether the child is "working" at the time of injury or not, others count as workers only those who are paid. These and other disparities will be discussed below.

Although this study touches on all children on the farm, it places primary emphasis upon young migrant and seasonal farmworkers, whether they accompany their parents or not. The great majority of migrant and seasonal farmworkers (be they youth or adults) work in crop agriculture as distinguished from livestock agriculture. Only a small percentage of hired farmworkers in crop agriculture work all year round.

The other child workers on a farm are likely to be the children of the owners or operators of the farm. Children of farm owners or operators are treated differently under the child labor laws from young hired workers. Children of farm owners and operators are subject to far fewer restrictions. Most importantly, they can work even in hazardous jobs at any age. (*See* Section V, below.)

The sources of factual information upon which this study relies are of three kinds. First, there are statistical compilations of entire defined populations, such as the 1992 Census of Agriculture, the Census of Fatal Occupational Injuries, and the Survey of

Occupational Injuries and Illnesses, as well as published analyses of these sources by academic and government researchers. Second, there are more specific analyses of limited groups of children, such as the 87 patients 16 years of age and younger who were treated for farm-related trauma at the emergency room at St. Mary's Hospital in Rochester, Minnesota, from November 1974 to July 1985 (Swanson, et al., 1987:1276). These more specific studies are not necessarily representative of the national or regional situation, but they provide information about individual accidents. Third, there are descriptions of individual young people working in agriculture from court decisions or hearing testimony that provide vivid detail about these workers.

This study of child labor in agriculture is divided into seven parts. The report opens with this introductory section. The second part provides a demographic snapshot of both the farmworker population as a whole and those who are under age 18. Analysis is provided which highlights the strengths and weaknesses of the available databases. The third part describes the work performed by children in agriculture. The fourth part is an analysis of the risk factors they face for fatal and nonfatal injuries. To the extent possible, the focus is on hazards facing young agricultural workers. However, because many studies encompass all farmworkers, these more general studies are also taken into account. Another set of studies examines injuries to all children who live and work on farms. These data, too, are analyzed for the light they shed on hired child workers. In the fifth part, there is a description of federal and state child labor laws regulating agricultural employment. A limited discussion is included of laws of general applicability, which could be used to reduce the hazards to children working in agriculture. The sixth part sets forth recommendations for enhanced legal protections. The seventh part contains concluding remarks.

II. A DEMOGRAPHIC SNAPSHOT OF AGRICULTURAL WORKERS

The number of persons working in agriculture in the United States, and their demographic characteristics, are not precisely known. Demographic characteristics are often of crucial importance in studying occupational safety. The total number of children working in agriculture, for example, is the denominator of a fraction whose numerator is the number of children who are reported to have suffered fatal or nonfatal accidents. Accident rate data of this kind permit comparisons of death and injury rates across industries. The level of poverty among agricultural workers is also indicative of the economic pressures they face. This may explain why some parents encourage their children to work, even though work may interfere with their children's education or expose them to hazards. Workers who do not speak English may not understand instructions given to them in English or pesticide labels which are written only in English. Workers who are not literate in any language may not be aware of warning signs intended to prevent them from entering treated fields. Workers who are not authorized to work legally in the United States are less likely to report injuries or complain of safety violations.

As such, the demographic characteristics of all agricultural workers, and not just those under age 18, are relevant for a full understanding of child labor in agriculture. Consequently, we first describe the demographic characteristics of all hired farmworkers, and then those of young workers under age 18.

A. Demographic Characteristics of Hired Farmworkers

In 1992 the *Report of the Commission on Agricultural Workers* estimated that there were 2.5 million hired farmworkers in the United States (Commission on Agricultural Workers, 1992:1). When dependents are added to the count, the total swells to 4.17 million (U.S. Department of Health and Human Services, 1990:13). About 1 million farmworker children live in the United States, with another 600,000 living abroad (Mines, 1997:5). Some farmworker children work, while others do not.

The scarcity of demographic data on farmworkers bears a brief explanation. The most comprehensive demographic survey is the decennial census. But many hired farmworkers do not have an address in March of the census year to which the census questionnaire can be mailed. In addition, in the past, enumerators rarely visited labor camps and, in any case, the migratory nature of the work often made farmworkers difficult to find or count.

Another source of information about hired farmworkers is the Current Population Survey ("CPS"). The CPS does not attempt to count everyone. Rather, its data are based on a representative sampling, done monthly, of approximately 60,000 households in all sectors of the economy including agriculture. By means of telephone interviews primarily, respondents are asked questions about demographic, social, and economic matters with regard to a specific week in that month. There is also a March supplement each year that asks similar questions about the entire prior calendar year. Given the seasonal nature of farm work, with peaks of employment during the harvest season and, to a lesser extent, during the planting season, the March supplement gives a more accurate picture of people doing farm work than the monthly reports can do. But even the March supplement tends to undercount migrant and seasonal workers. Given the CPS's reliance on telephone contact, many hired farmworkers are missed because many migrant and seasonal farmworkers do not live in established residences, do not have ready access to a telephone, or do not speak English proficiently.

The best source of data on hired farmworkers is the National Agricultural Worker Survey ("NAWS"). Like the CPS, NAWS is a sampling and not an attempt at a full count of every worker. Its great advantage is that it is based on face-to-face question and answer sessions conducted by bilingual and bicultural interviewers. This method yields a more accurate picture of farmworkers' characteristics than the CPS telephone surveys can do. Because this approach is time-consuming and expensive, however, only a few thousand workers are surveyed during the three yearly cycles, in February, June, and October.

NAWS also differs from the CPS, in that NAWS focuses exclusively on hired farmworkers, whereas the CPS covers self-employed and unpaid workers as well as hired workers. In addition, NAWS, unlike CPS, only covers farmworkers who are engaged in crop agriculture (excluding those who work with livestock). The crop sector of agriculture, under Standard Industrial Classification ("SIC") code 01, includes "field work" in fruits, vegetables, silage and other animal fodder, cash grains and the vast majority of nursery products. The workers covered by the NAWS sample include farmworkers, field packers, supervisors, and even those who simultaneously hold nonfarm jobs. The NAWS sample, however, excludes H-2A temporary foreign agricultural workers and unemployed farmworkers.

Using NAWS data, a demographic picture of farmworkers emerges. The great majority of hired farmworkers – 81 percent – are foreign-born (NAWS, 2000:5-6). Fully 77 percent of hired farmworkers are from Mexico, 2 percent are from other parts of Latin America, 1 percent are from Asia, and 1 percent are from other countries. Of the 19 percent of hired farmworkers who U.S.-born, 9 percent are Hispanic, 7 percent are non-Hispanic whites, 1 percent are non-Hispanic blacks, and 1 percent are of other backgrounds.

Spanish is the native language of 84 percent of hired farmworkers (NAWS, 2000:13, 18). Less than 5 percent of Mexican-born and other Latin American-born farmworkers report speaking English well. Even of U.S.-born Hispanic workers, only 62 percent say that they speak English well.

Due to lack of formal education, the literacy rate of hired farmworkers, even in their native language, is low (NAWS, 2000:16). Twenty percent of farmworkers have less than a fourth grade education, and 38 percent have only four to seven years of schooling. It is estimated that 85 percent of the hired farm work force would have difficulty obtaining information from written materials in any language.

An estimated 52 percent of hired farmworkers lack work authorization (NAWS, 2000:22). The percentage of undocumented workers has risen considerably over the last decade. In 1989 – in the wake of the legalization brought about by the Immigration Reform and Control Act of 1986 – an estimated 7 percent of farmworkers were undocumented. By 1994-1995, the number of undocumented workers had risen to 37 percent (Mines, et al., 1997:iii) and in 1997-98, it reached 52 percent.

A third of farmworkers work in fruit and nut crops, 28 percent work in vegetables, 16 percent in field crops, 14 percent in horticulture, and the remaining 9 percent in other crops (NAWS, 2000:30). In terms of tasks performed, 32 percent take part in harvesting activities; 22 percent engage in pre-harvest tasks such as hoeing, thinning, and transplanting; and 15 percent do post-harvest tasks such as field packing, sorting, and grading. Others perform skilled or semi-skilled duties such as irrigating, operating machinery, and pruning.

Most hired farmworkers are very poor. Half of all individual farmworkers earn less than $7,500 per year, and half of all farmworker families earn less than $10,000 per year (NAWS, 2000:39). As a result, 61 percent of all farmworkers live below the poverty line. The average farmworker earns only $5.94 per hour and 12 percent earn less than the federal minimum wage ($4.75 per hour effective October 1, 1996, rising to $5.15 per hour effective September 1, 1997). In terms of constant 1998 dollars, farmworkers' average wages declined by 10 percent in the last decade (NAWS, 2000:33). Similarly, the average number of weeks per year spent doing farm work has declined from 26.2 weeks in 1990-1992 to 24.4 weeks in 1996-1998 (NAWS, 2000:25).

Most hired farmworkers are male and young and many have children (NAWS, 2000:10, 11). Four out of every five hired farmworkers are men. The median age of all farmworkers, men and women combined, is 29. Nearly half (45 percent) of all farmworkers have children and 24 percent have children who live with them (NAWS, 2000:11). Not all children who accompany their parents work on the farm, but by virtue of living near the fields, all are exposed to some of the hazards of agriculture.

B. Demographic Characteristics of Children Working in Agriculture

Estimating the number of hired farmworkers under age 18 is difficult, because of gaps in the available data. The CPS sample excludes all children under age 15, and hence fails to include many children working legally in agriculture. NAWS excludes all children under age 14, and covers only crop agriculture. Since children under the ages of 14 and 15 can work legally on a farm, both CPS and NAWS undercount the number of children working in agriculture. The CPS March supplement (which includes all those, whether paid or not, who have done agricultural work within the past 12 months) estimates the number of 15- to 17-year-old workers at 290,000 (USGAO, 1998:22). By contrast, averaging the results of the monthly CPS surveys over the entire year, yields an estimate of 155,000 young workers. Of these 155,000 workers, nearly 75 percent (116,000) are hired farmworkers, while 24,000 are self-employed and 15,000 are unpaid family members (USGAO, 1998:22-23). The NAWS surveys for the years 1993-1996 show an average of 128,500 hired workers between 14 and 17 years old in crop agriculture.

Hired child workers fall into two main categories. Some are accompanied by their parents (who are themselves hired farmworkers). The others are children living apart from their parents. Some of these children are totally on their own while others are accompanied by a relative (e.g., an uncle or older brother), or a friend from their home community.

The number of unaccompanied youth is estimated to be 55,000 (Mines, 1997:21). Roughly two-thirds of these children – perhaps as many as 40,000 in all – are foreign-born, and 85 percent are boys (Mines, 1997:22). The great majority of unaccompanied children (87 percent) live without any relatives. Their levels of income and education are significantly lower than those of all farmworkers. Specifically, these foreign-born children's median annual personal income is between $1,000 and $2,500, and even when

their income is added to that of relatives with whom they share expenses, the combined total is only between $2,500 and $5,000 per year. More than half of these children have less than a sixth grade education.

One third of unaccompanied children are American-born. Their personal annual income is no greater than that of their foreign-born counterparts, but when it is combined with that of relatives with whom they share expenses, the total is much higher than that of the foreign-born: $10,000 to $12,500. In addition, more than half of these young workers have completed tenth grade or beyond.

The other main category of working children is those who accompany their parents to work. According to the NAWS, about 15 percent of farmworker children, from ages 10 through 17, do farmwork themselves (Mines, 1997:16). Older children within this group are more likely to work than younger ones. The great majority of these working children are 14 through 17; only 5 percent are children ages 10 through 13. Children with only one parent are also much more likely to work; 23 percent of such children report working in the fields. The greatest labor participation is among children who have at least one American-born Hispanic parent: 33 percent of these children do farm work.

III. WORK PERFORMED BY CHILDREN IN AGRICULTURE

According to NAWS, about 40 percent of agricultural workers ages 14 through 17 work at harvesting tasks (USGAO, 1998:25). These are physically demanding and repetitive tasks that require bending, kneeling, stooping, climbing ladders, and/or carrying heavy bags or buckets of picked crops. These activities frequently require the harvesters to work with their arms above shoulder level or to move their hands and wrists in repetitive motions (Villarejo and Baron, 1999:622). This work often also requires lifting boxes, bags or buckets containing more than 50 pounds of fruit or vegetables.

Most young workers in crop agriculture work with vegetables (40 percent) and fruits and nuts (20 percent) (USGAO, 1998:25-26). Grain and livestock farms are generally family operations hiring few workers.

Some examples will illustrate the working conditions young workers encounter. A 13-year-old Hispanic migrant worker described his work experiences in testimony before Congress in 1991. He harvested strawberries in California six days a week from 6:30 a.m. to 8:00 p.m. "I stoop, moving up and down the rows of strawberry plants, looking for good berries and then placing them in a packing box. I move my cart up and down the field....At the end of the day, our backs hurt and we are tired." (U.S. House Committee on Government Operations, 1992:26). Harvesting citrus fruit is different, but no less strenuous. Workers must haul ladders to the trees and, while climbing ladders, cut the stems of the fruit with clippers, rather than pull the fruit from the stem, in order to maintain the stem "integrity." The workers then put the fruit in a bag slung around their neck and shoulders, which can weigh up to 50-60 pounds when full. When the bags are

full, the harvester climbs down the ladder and carries the heavy load to a field box into which it is dumped (Commission on Agricultural Workers, 1992, App. I:83, 95). These activities often lead to musculoskeletal disorders including back pain, strains, sprains and carpal tunnel syndrome.

There is no limit under federal law to the number of hours per day or per week that children are permitted to work in agriculture. As a result, the hours worked are often long. Children ages 14 through 17 work an average of 31 hours per week in agriculture. Within that age group, American-born children work an average of 27 hours per week, while foreign-born children work an average of 35 hours per week (USGAO, 1998:25). Being averages, these figures mask a wide range of hours worked by individual children, some of whom work more than 40 hours per week. While long hours are due in part to the necessity to harvest crops when they are ripe, they can also in part be explained by the fact that farmworkers are not entitled to overtime pay under the Fair Labor Standards Act. As a consequence, agricultural employers have no financial incentive to limit the work week to 40 hours.

Federal law also provides no limit regarding the time of day that children can work in agriculture. Consequently, some of their work is done early in the morning or late in the evening. Sheer weariness can lead to injuries. In 1992, 14-year-old Joel Compos was killed when he fell asleep at 2:30 a.m. in a Washington field and was run over by a truck (San Diego Union Tribune, June 21, 1992).

Children's work in agriculture is mainly seasonal, with far less work in the winter than in the other three seasons, and most work occurring in the summer (USGAO, 1998:25). The CPS data also indicate that on average, half of all young workers work more than 3 months per year. As such these young workers are working more than just during summer vacation.

IV. RISK FACTORS FOR FATAL AND NONFATAL INJURIES IN AGRICULTURE

Young agricultural workers suffer from disproportionately high rates of work-related deaths and injuries. The best available data show:

- Children who live and work on farms suffer an average of 104 fatal injuries and 22,287 nonfatal injuries each year (Rivara, 1997).
- The rate of fatal injuries among young farmworkers is 8.0 per 100,000 workers and their annual incidence of nonfatal injuries is 1,717 per 100,000 workers (Rivara, 1997).
- Transportation incidents, both on the highway and off, are the leading cause of death to farmworkers (Toscano and Windau, 1998:40).

- Other leading causes of fatalities for young farmworkers include: farm machinery; non-traffic motor vehicle incidents; drowning; animals; and firearms and explosives (Rivara, 1997; Schenker, et al., 1995).

- A California study found that boys are three times more likely than girls to die in farm accidents and that the death rate for Hispanic boys is 70 percent higher than for non-Hispanic boys (Schenker, et al., 1995).

- A study of workers' compensation claims filed in Washington State found that 26 percent of all claims filed by farmworkers under age 18 were for serious or disabling injuries, which was twice the rate of serious or disabling injuries to young workers in the food service industry (Heyer, 1992).

Data on all Agricultural Workers. Agriculture is one of the three most hazardous industries in the United States. The National Safety Council, relying on data from the Census of Fatal Occupational Injuries ("CFOI"),[2] found that in 1997 the death rate per 100,000 workers in agriculture was 20. The fatality rate for all agricultural workers was exceeded only by mining, with a death rate of 24 (National Safety Council, 1997). Another way to highlight the excessive fatality rate in agriculture is to note that while workers in agriculture accounted for slightly less than 2 percent of workers in all industries, they incurred 9 percent of all job-related fatalities (Toscano and Windau, 1998:39 (data for 1996)).

Crop agriculture is particularly hazardous. Since migrant and seasonal farmworkers are employed largely in crop agriculture, these workers are especially at risk. While the fatality rate in 1996 for all of agriculture was 22.2 per 100,000 workers, the rate in crop agriculture was 41 percent higher – at 31.3 per 100,000 workers (Toscano and Windau, 1998:44). Another analysis, which compared fatalities in crop agriculture with fatalities in livestock agriculture during the period 1992 through 1995, found that crop agriculture had more than twice as many deaths per year, on average, as livestock agriculture (Murphy and Yoder, 1998:59, Table 1).

A closer look at CFOI shows that although it is one of the best estimates of occupational fatalities available, its agricultural estimates are not free of imperfections. To understand its major flaw, it is useful to recall that the fatality rate in any industry is derived from a fraction whose numerator is the number of deaths in that industry during a given time period and whose denominator is usually the average number of workers in that industry during the same period of time. If the numerator is too small because not all deaths are counted, then the reported fatality rate will be lower than the actual rate. Similarly, if the denominator is too large, then the reported fatality rate will be lower than the actual rate. A denominator that treats all workers as full time will be too large when a substantial portion of the workforce is comprised of part-time workers.

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[2] The Census of Fatal Occupational Injuries is published by the U.S. Department of Labor's Bureau of Labor Statistics.

The denominator used by CFOI is based on an estimate of the annual average number of workers employed in each industry taken from the 60,000-household Current Population Survey (CPS). As noted in Section II above, the CPS severely undercounts migrant and seasonal farmworkers. The exclusion of many farmworkers from the CFOI denominator suggests that it is too small, and hence that the actual fatality rate in agriculture is lower than that shown by CFOI. On the other hand, CFOI assumes that all workers in each industry work full-time. This assumption has exactly the opposite effect on the denominator and the fatality rate. The effect of this assumption can be seen by examining data for 1996, when the fatality rate in crop agriculture was 31.3 per 100,000 workers. (Toscano and Windau, 1998:44). According to NAWS data, hired farmworkers in crop workers work an average of 24.4 weeks per year, and an average of 38 hours per week (NAWS, 2000:25, 34 – data for 1996-1998). Taken together, this yields a total of 927.2 hours per year per worker, which is less than half of a full-time worker's annual hours (40 hours per week x 50 weeks per year – with two weeks of vacation – equals a total of 2,000 hours per year). Accordingly, if the CFOI fatality rate were expressed as fatalities per 100,000 full-time-equivalent workers, the rate in crop agriculture would be more than double the 31.3 rate. A fatality rate calculated on the basis of hours worked plainly would be more accurate for an industry like agriculture, where many workers work part-time.

While CFOI's use of CPS data in the denominator would tend to make the fatality rate in agriculture too high, its reliance on fatalities per worker (rather than fatalities per hours worked) tends to make the fatality rate in agriculture too low. Taken together it may be that, on balance, the CFOI fatality rate in agriculture is roughly correct. Though CFOI may be imperfect, it does show that agriculture is one of the nation's most hazardous industries.

The causes of farm fatalities have also been studied, using CFOI data. Transportation incidents are by far the leading cause of death. In 1996, for example, 46 percent of all fatalities were caused by transportation, with nearly two-thirds (65.2 per cent) of these fatalities being non-highway vehicle incidents (Toscano and Windau, 1998:40). Many hired farmworkers are killed on the highways while traveling from labor camps or distant homes to the fields to work, or just going from one field to another.[3]

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[3] Newspapers throughout the country are replete with accounts of farmworkers who are killed or injured in highway incidents going to or from work. For example, in a 13-month period, from February 1999 to March 2000, the following incidents were reported: "Friends offer aid to grieving migrant worker," *Sarasota Herald-Tribune*, Mar. 6, 2000 (in an accident in Parrish, Florida, 4 farmworkers were killed, and 5 were injured including an 18- and a 19-year-old); "Fourteen Killed in Crash in N.M.," *AP Online*, Dec. 4, 1999 (in Edgewood, New Mexico, 13 farmworkers were killed and 4 were injured in a van accident); "News," *Seattle Post-Intelligencer*, Aug. 10, 1999 (p. A3) (in Five Points, California, 13 farmworkers were killed and 2 were injured in an incident); "2 Killed, 3 Injured in Morning Auto Accident," *The San Diego Union-Tribune*, July 16, 1999 (two farmworkers were killed and 2 were injured in Carmel Valley, California); "Man in Wreck Freed Hours Earlier," *The Augusta (Ga.) Chronicle*, Mar. 31, 1999 (a 17- and an 18- year old worker were killed, and another farmworker was injured in an incident in Lexington, South Carolina); and "2 Die in Packed Van; A Semi-truck Crashed into its Side; Fog Impaired Efforts to Rescue the Injured, and May Have Contributed to the Accident," *Sarasota Herald-Tribune*, Feb. 27, 1999 (2 farmworkers were killed and 14 were injured in another incident in Parrish, Florida).

Off-highway vehicle fatalities are due mainly to tractors, which account for more than one-third of all farm deaths. Specific incidents include workers falling from tractors and hitting the ground, getting run over by a tractor, being struck by equipment pulled by tractors, getting caught in the power takeoff or other moving parts, and being struck by tractors that have overturned or slipped into gear. Contact with objects and equipment was the second leading cause of death (27 percent of all fatalities). This category includes being struck by an object or being caught in or compressed by machinery. Exposure to harmful substances or environments resulted in 8 percent of deaths. Other causes included falls and animal assaults.

Agricultural workers also suffer from a high rate of non-fatal injuries. According to the Survey of Occupational Injuries and Illnesses ("SOII"),[4] the rate of all injuries and illnesses in agriculture in 1997, was 8.4 per 100 workers.[5] This injury rate was higher than that of any other industry except manufacturing and construction, which had rates of 10.3 and 9.5 per 100 workers, respectively (Jacobs, 1999:345-346).

The rate of work-related injuries in agriculture would be even higher but for certain peculiarities of the SOII database. Specifically, the SOII survey excludes all injuries and illnesses to the self-employed and to workers on farms with fewer than 11 employees. Despite these omissions, SOII provides instructive information on the severity of agricultural injuries and illnesses. Data for 1995 show that more than a third of all agricultural injuries recorded in SOII – representing 3.3 workers per 100 – required the employee to miss at least one day of work, beyond the day of the incident (Personick, 1997:56 (Table 3)). Only the construction and the transportation and public utilities industries had a higher rate of such serious lost-day injuries (4.1 and 3.7 per 100, respectively).

SOII data also provide information on the kinds of injuries incurred. In crop agriculture, for example, nearly one-third (32.3 percent) of lost-day injuries were sprains and strains, and another 10.2 percent were back pains and pains in other parts of the body (Compensation and Working Conditions, Summer 1998:89-90 (Table E-1 - 1996 data)). Other significant kinds of lost-day injuries in crop agriculture involved cuts and punctures (13.0 percent), bruises (10.0 percent), and fractures (6.0 percent). This high incidence of sprains, strains, and back pain reflects the danger of musculoskeletal injuries in agriculture. The frequent lifting and moving of heavy bags and other containers filled with fruits and vegetables; the lengthy periods of kneeling, stooping and squatting; and the repetitive hand and arm motions are all assaults to the lower back, the knees, and the fingers, wrist and forearm, resulting in musculoskeletal disorders ("MSD") (USDHHS, NIOSH, 1986:7-8).[6]

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[4] The Survey of Occupational Injuries and Illnesses is also published by the Bureau of Labor Statistics.

[5] This rate includes a range of injuries from severe injuries resulting in lost days of work to lesser injuries requiring medical treatment other than first aid.

[6] Small scale studies confirm the prevalence of MSDs among farmworkers and the serious long term consequences of these disorders. A study of large California plant nurseries over a 24-month period revealed evidence of 85 musculoskeletal disorders involving 1246 lost workdays, for an average of nearly

Data on Young Agricultural Workers. Before CFOI was created in 1992, another researcher sought to determine the number of fatal and nonfatal injuries to children living and working on farms from other databases (Rivara, 1985). His findings resulted in the most frequently cited statistics on hazards to children in agriculture: that children who live and work on farms suffer nearly 300 fatal injuries and 23,500 nonfatal injuries each year. What makes Rivara's work even more useful is that he published another study 12 years later, based on the same databases, and hence was able to draw certain conclusions based on longitudinal data. Another particularly important feature of Rivara's two studies is that by counting deaths and injuries on the farm regardless of whether the affected child was employed or not, he did not have to try to make the difficult determination, encountered in CFOI, of whether or not the child was an employee. Hence he was able to capture *all* children who were exposed to farm hazards.

It is instructive to consider Rivara's 1985 study, as well as his 1997 work more carefully. In the 1985 study, in order to determine the number of deaths, Rivara relied on tapes reporting information from death certificates for calendar years 1979, 1980, and 1981 received by the National Center for Health Statistics ("NCHS") from all states and the District of Columbia. These tapes provided a full count of all deaths. From these NCHS tapes, Rivara extracted all information on deaths of individuals 19 years of age and younger from external causes that occurred on a farm (including farm homes). However, he did not count motor vehicle fatalities, because they could not be separated as to place of injury – whether on a farm road or elsewhere – based on the available data. Rivara's study was by far the most thorough study that had been done up to 1985 on farm deaths and injuries to children in the United States, and it has proven invaluable as a source of data. Nonetheless, some of his choices of using and arranging the data need to be examined.

First, Rivara uses age 19 as the upper age limit, and hence includes some children over age 18. Rivara had access to the age of everyone who died, and some of his tables show age ranges, such as less than 5 years old, 5 to 9 years old, 10 to 14 years old, and 15 to 19 years old. The average number of deaths per year for the three years surveyed was 286 (or "nearly 300," as this figure is usually referred to by later investigators), with 111 deaths within the 15 to 19 year olds age range. A more precise breakdown by age would have been more helpful.

Second, Rivara counts all deaths on the farm, including those that occur in the farm home, which means that he is counting deaths that arose out of employment as well as those that did not. His tally therefore includes deaths that could occur in any home, such as electrocution by a wall outlet, as well as deaths that occur primarily from farm employment, such as being crushed by a tractor rollover. From the point of view of

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15 lost days per incident. The rate of MSD incidence was 4.0 per 100 nursery workers (Meyers, 1999). A 1996 study of 200 disabled farmworkers found that back and other musculoskeletal conditions were the top two causes of disability (Strong and Vida, 1999).

overall farm safety, the totality of deaths may be important, but from the point of view of protecting children who work in agriculture, his focus is overinclusive.

Third, Rivara excludes transportation-related fatalities. He himself recognizes in a subsequent study (Rivara, 1997:193) that this is a significant limitation, because, as he notes, "motor vehicle crashes are an important source of occupational injuries and, for migrant farm workers, may be the leading cause" of employment-related fatalities.

In short, Rivara's death data, by excluding all motor vehicle deaths, greatly undercount the number of farm-related deaths arising out of employment. But because he counts deaths in the farm home, his number includes at least some deaths that could have occurred in any home.

Rivara's count of nonfatal farm injuries is based on the National Electronic Injury Surveillance System ("NEISS") maintained by the federal Consumer Product Safety Commission ("CPSC"). This is a surveillance system of nonmotor-vehicle-related injuries in the United States involving consumer products, without regard to where the injury occurred. The information on these injuries comes from a representative sampling of hospital emergency rooms. Rivara obtained tapes from the CPSC on injuries involving farm products to individuals 19 years of age and younger for the years 1979, 1980, 1981, 1982, and 1983. His extrapolations from the NEISS representative sample resulted in an estimate of an annual average of 23,505 emergency room treatments.

Rivara himself recognized the limitations of the NEISS data. First, there is a question about how representative the sample of emergency rooms is in estimating consumer product injuries on farms. The sample, he notes, does not necessarily reflect hospitals located in rural areas where most farms are located. This flaw may be particularly significant for pediatric injuries, because the hospitals in the NEISS sample that specialize in pediatric care are primarily located in urban areas.

Second, the sample includes only injuries treated in hospital emergency rooms. This approach results in a considerable undercount, as Rivara himself is the first to recognize in citing a study of nonfatal farm injuries in Ontario which indicated that only 28 percent of farm injuries are treated in the emergency room, and that only 68 percent of all farm injuries receive any medical care at all (Pickett, et al., 1995).

Third, the NEISS database includes only product-related injuries, thus excluding many other kinds of injuries on the farm, such as injuries due to farm animals, drowning in natural bodies of water, falls unrelated to equipment, and others.

Fourth, the NEISS injury data, like the NCHS death date discussed above, include work-related and nonwork-related incidents

Rivara also calculated rates of fatal and nonfatal injuries on the farm. The denominator he selected for the rate calculation was the total number of children age 19 and younger who were living on farms, based on the April 1, 1980, census enumeration.

The Bureau of the Census used the following guidance for counting the farm population of the United States: "all persons living in rural territories or places which had or normally would have had sales of agricultural products of $1,000 or more during the reporting year." According to Rivara, the 1980 census tally counted 2,164,000 children who were living on farms. On the basis of this denominator, Rivara calculated the fatality rate for those 19 years old and younger at 13.2 deaths per 100,000 children in that age range living on farms. Using the same denominator, he computed the nonfatal injury rate to be 1,551 per 100,000 children age 19 and younger.

Despite the problems he faced in trying to find an appropriate denominator, and hence the most accurate rates of death and injury, Rivara made a later study of the years 1990 to 1993, based on the same data sources (Rivara, 1997). This approach enabled him to try to determine whether the rates of fatal and nonfatal injuries had increased or decreased in the decade between his two studies. All of the flaws in his earlier approach as described above were still present in his later research, but he was able to learn whether the incidence of fatal and nonfatal injuries for individuals age 19 and younger living on the farm had changed.

Rivara's comparisons yield most interesting results. The annual incidence of fatal injuries *decreased* 39 percent, from 13.2 per 100,000 in 1979-1981 to 8.0 per 100,000 in 1991 - 1993, whereas the annual incidence of nonfatal injuries *increased* 10.7 percent, from 1,551 per 100,000 in 1979-1983 to 1,717 per 100,000 in 1990-1993.[7] Rivara offers several explanations that are likely to explain these trends. Noting that nearly half of children who die from farm accidents now die in hospitals compared with only 15 percent in the earlier study, he points out that emergency medical services have improved substantially for those injured on the farm. Another improvement in medical care, he notes, is better regionalized trauma care. As for preventive interventions that could explain the decline in the death rate, Rivara notes that rollover protective structures ("ROPS") on tractors have doubtless reduced the principal cause of farm deaths – tractor accidents. (ROPS were required by Occupational Safety and Health Administration regulations at 29 C.F.R. § 1928.51(b) to be installed on all agricultural tractors manufactured after October 25, 1976.) Thus, in the earlier study, few tractors had ROPS protection, whereas by the time of the later study, many more were so equipped.

As for the 10.7 percent increase in nonfatal injuries, Rivara notes that there are several possible causes, including the lack of child care options that results in many parents taking their children into the fields where, even if they are not working, they are exposed to many hazards. In this connection, he notes, some children are allowed to ride on tractors and other farm machinery almost as a diversion or entertainment, despite the high risk of injury.

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[7] Rivara states that there were an annual average of 104 fatal injuries to youth living and working on farms from 1991-1993, but he does not indicate the annual average number of nonfatal injuries. However, the number of nonfatal injuries can be calculated from the data he provides. Since the average annual rate of nonfatal injuries (in the period 1990-1993) was 1,717 per 100,000 youth and the 1990 Census data reveal that there were 1,298,000 children under age 19 living on farms, the average number of nonfatal injuries per year was 22,286.

Rivara's data also disclose the causes of death and injury. The 1997 study listed machinery as the cause of more than one-third (34.1 percent) of the deaths, with drowning the cause of an additional 24.1 percent of deaths, followed by firearms and explosives accounting for 14.8 percent of the fatalities. With regard to nonfatal injuries, Rivara notes in his 1997 study that lacerations and punctures were the leading type of injury (37.6 percent), followed by contusions, abrasions, and hematomas (23.3 percent) and dislocations and fractures (19.5 percent).

While CFOI also provides data on the deaths of children working in agriculture, its results in this area are less complete. There are several methodological problems involving the reporting of children's fatalities that make it difficult to accurately count work-related deaths among children. The main reason is that the sources of information relied upon by CFOI often fail to indicate that a child worker's death is work-related.[8]

CFOI uses multiple sources to identify occupational deaths – not only death certificates (where the "Injury at Work" box is marked "Yes"), but also state and federal workers' compensation reports, federal agency reports (from the Occupational Safety and Health Administration among others), and many other fatality reports, such as newspaper articles, medical examiner reports, autopsy reports, and motor vehicle reports. CFOI requires two documents from this group to confirm a work-related death. If only one of these source documents can be found to verify a death, then a follow-up questionnaire is sent to the business establishment for confirmation of the fatality. Four years of CFOI data for the Agriculture, Forestry, and Fishing Industry, covering 1992 through 1995, have been analyzed according to various characteristics of workers, including age group (Murphy and Yoder, 1998). The percentage of all farm deaths attributed to those employees who are age 19 and younger – 5 percent of all farm deaths – appears to Murphy and Yoder to be too low. They offer several reasons why this is so. Children ages 14 and younger are not normally viewed as having an "occupational" status, and as a result the Industry and Occupation categories on their death certificates are often left blank and/or filled in as "Student." Moreover, the "Injury at Work" question is often checked "No" because this question asks about the "usual occupation" of the person. Another important source of information about fatal injuries is state workers' compensation reports, but this is not always a good source of information about farmworker fatalities. Commonly a child may be injured while doing nonpaid work on a family farm or on a relative's farm; in those situations no workers' compensation report would be filed. Hired farmworkers are not covered by the workers' compensation insurance in many states. Only 12 states require farmworkers to be covered by workers' compensation benefits to the same extent as other workers; the other states provide for only partial coverage or make such coverage optional at the discretion of the employer. In addition, agricultural workers often do not take advantage of such benefits even when

[8] CFOI data for 1992 through 1995 show a total of 155 fatalities for workers age 19 and under in the combined category of agriculture, forestry and fishing (Derstine, 1996:41 (Table 4)). Of these 155 fatalities, 91occurred to workers who were non-family members and 64 occurred to youth who were working in a family-owned business.

they are available. The NAWS survey, for example, discloses that only 1 percent of hired farmworkers use disability insurance or Social Security (NAWS, 2000:40).

Murphy and Yoder point to another source of data on fatalities on farms in order to attempt to rectify this problem – injury reports generated at the state level by cooperative extension programs. (These cooperative extension reports encompass all those injured from exposure to a farm hazard, without making any distinction as to occupational status.) Studies of fatal injuries disclosed by these reports in Indiana, Pennsylvania, and Wisconsin, when broken down by age range, show that children ages 15 and under account for the greatest number of fatalities – 20-25 percent – of any age group (Murphy and Yoder, 1998:61).

Even though Murphy and Yoder conclude that CFOI data for 1992 through 1995 on farm deaths among workers aged 19 and younger underreport such fatalities, another researcher, analyzing the same data, found that these young farm workers (excluding managers) led all youths in job-related fatalities (Derstine, 1996). In nearly a third of these deaths (32.2 percent), the cause was a non-highway vehicular incident, such as a youth operating or helping to operate a tractor on a farm.

CFOI, as noted above, can provide a tally of deaths of children on the job (subject to the undercounting problems explained by Murphy and Yoder). However, CFOI cannot provide a fatality *rate* for young workers, because the denominator used by CFOI – the CPS – includes only those who are 15 years old and older.[9] As explained in Section V below, the normal minimum age under federal law for agricultural workers is 14 years old – and various exemptions permit children of 12 or younger to do farm work. Even if these younger workers were included in the CPS, and hence in the CFOI denominator, the *rate* of fatalities for children would still almost certainly be greatly underestimated. As explained in an article entitled "Denominator Choice in the Calculation of Workplace Fatality Rates," when the denominator relies on hours actually worked rather than on the average number of workers (like CFOI), workers under age 20 have rates that are 60 percent higher (Ruser, 1998). This dramatic finding reflects the fact that young workers are much more likely to work fewer hours per week and fewer weeks per year than older workers.

More detailed data about risk factors have come from studies of groups at the state level or at a specific hospital or emergency room. One such study (Heyer, et al., 1992), using workers' compensation data, covers only hired farmworkers who suffered occupational injuries in Washington State.[10] The study focused on workers under age 18 who filed claims during a four-year period, 1986 through 1989. Because there was no information on how many farmworkers under age 18 were covered by the Washington

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[9] The CFOI's fatality rate for all workers takes account of this deficiency by including in the numerator only those workers who are 15 years old and older.

[10] The Heyer study also excludes injuries to children of farm owners or operators because they are not covered by the Washington State workers' compensation law.

workers' compensation law in that period, Heyer and his associates had no "denominator" data from which to calculate incident rates. However, in order to be able to make some comparisons, the study also collected workers' compensation claim data for workers under age 18 in the food service industry (another industry in which many young workers are employed).

The Heyer study's most notable finding was the high proportion of serious and disabling injuries occurring among children working in agriculture. Twenty-six percent of the claims filed by farmworkers under age 18 were for serious or disabling injuries, whereas only 13 percent of the claims filed by young food service workers were for serious or disabling injuries.[11] In other words, serious or disabling injuries were twice as likely to occur to children working in agriculture than to children employed in the food service industry.

The hospital-based studies show in greater detail how serious agricultural injuries can be. A study in Rochester, Minnesota, covering the period from November 1974 through July 1985, reviewed all farm-based traumas to children age 16 and younger (Swanson, et al., 1987). More than 80 percent of the children who were admitted required hospitalization, and the average hospital stay was 12 days. The most common injury, representing 62 percent of the total cases, was fractures. Farm machinery was overwhelmingly the cause of the injury, led by corn augers (the cause of 48 percent of the injuries), reflecting the importance of corn as a field crop in this part of the country. Other major causes were tractors (25 percent), power takeoffs (11 percent), and conveyor belts (6 percent).

A study done in California, where a higher percentage of migrant and seasonal workers are employed than in Minnesota, also highlighted the dangers of farm machinery (Schenker, et al., 1995). The California study was based on a review of death certificates for farm-related deaths from 1980 to 1989 to children under age 15. The study excluded deaths occurring in a farm residence or traffic accidents. The leading single cause of death, resulting in 30 percent of all fatalities, was farm machinery, particularly tractors. Next, at 23 percent, was non-traffic motor vehicle deaths (including off-road vehicles). Animals caused 13 percent of deaths, and drownings accounted for 10 percent. Schenker and his associates also coded for the sex and ethnicity of the young victims, and found that boys were three times more likely than girls to die in farm accidents. The increased danger to boys has been found in other studies as well (Cogbill, et al., 1985; Swanson, et al., 1987; Salmi, et al., 1989). The Schenker study also disclosed that the death rate for Hispanic boys in California was 70 percent higher than of non-Hispanic boys.

A review of recent workers' compensation claims filed in Washington state by farmworkers age 18 and under provides an overview of the kinds of injuries that occur to minors working in crop agriculture. In the years 1996-1998, approximately one third of the injuries were cuts, sprains, and fractures resulting from falls (usually from ladders). There was also a substantial number of contusions and fractures caused by farm

[11] The comparable rate for all industries combined was 15.9 percent.

machinery. Other kinds of injuries to minors include cuts from farm tools, eye abrasions, sprains from overlifting, scratches and skin irritation from vegetation, and heatstroke. (*See* Appendix D.) A survey of recent California OSHA data on work injuries in that state shows that minors in agriculture suffer from injuries such as bruises, amputation of fingers and arms from machinery, and fractures from falls. (*See* Appendix E.)

No discussion of risk factors to children in agriculture, particularly crop agriculture, would be complete without mention of the effects of heat. Working under a hot and hazy summer sun has a debilitating effect on all farmworkers, and especially children. When pre-adolescent children do work similar to that of adults in a hot environment, they generate more heat per pound of body weight than do adults, but their bodies do not sweat as much. As a result, children tend not to cool off as quickly as adults, and they have a lower tolerance for work in very high temperatures (USEPA and OSHA, 1993:21). In general, people with a small body size are often more sensitive to heat (id. at 15). For these reasons, children even more than adults need to have opportunities to keep cool such as regular rest periods, work during cooler hours of the day, less strenuous work, and ready access to cool water (id. at 16).

V. LAWS AFFECTING CHILD LABOR IN AGRICULTURE

There are three types of laws that affect child labor in agriculture. The first and most important are the federal and state statutes that directly regulate the employment of children in agriculture. The federal law is the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"), which contains child labor provisions that apply to employment in both agriculture and the nonfarm sector. States have different schemes, some do not regulate agriculture at all, others mirror the FLSA, and still others impose restrictions on agriculture which are more protective than the federal standard. The federal child labor law is described in section A below and the state child labor laws are covered in section B below.

Second, there are laws of general applicability that are designed to reduce hazards to employees in the workplace or to protect all people from exposure to pesticides. The most important of these federal enactments are the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 ("OSH Act"), the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA"), and the Food Quality Protection Act, Pub. L. No. 104-170, 110 Stat. 1489 (codified in 7 U.S.C. §§ 136-136y and 21 U.S.C. §§ 301-346a) ("FQPA"). These three laws are discussed in section C below.

The third category of laws that can serve to protect children in agriculture encompasses various statutory and court-created remedies that affect health and safety. These include the federal Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 ("AWPA"), which can lead to a safer working environment for all workers, including children; personal injury claims for wrongful death or negligently inflicted injury, which permit the recovery of compensatory and punitive damages; state workers' compensation laws, which typically bar any tort claim for death or injury arising

from a job-related accident, but permit recovery of small, statutorily-prescribed benefits without the need for proof of fault; labor relations statutes that authorize workers to engage in collective action to improve their working conditions; the overtime compensation provisions of the FLSA, which create a financial incentive for employers to limit the workweek to 40 hours; and the minimum wage provisions of the FLSA, which are intended to guarantee a minimal level of earnings. These laws are discussed in section D below.

A. Federal Child Labor Law

The FLSA regulates the employment of children in both agriculture and general industry. Its provisions cover matters such as age requirements, hours limitations, and restrictions on hazardous work. In every respect, however, the protections afforded children working in the nonfarm sector are greater than those covering children who work in agriculture.

1. Age Restrictions

In regulating of the age at which children can work, the FLSA establishes a normal minimum work age of 16 outside of agriculture and a normal minimum work age of 14 for agriculture. The normal minimum age applies to work performed outside of school hours for the school district in which the child is living.[12] Section 13(c), 29 U.S.C. § 213(c) (attached as Appendix A). For agricultural occupations that the Secretary of Labor designates as particularly hazardous to children, the minimum age is 16. In all other industries, by contrast, a worker must be age 18 to engage in hazardous work.

In a number of situations, Congress has legislated lower ages or lesser protections, or both, for certain children engaged in agricultural employment. These exceptions cover children of the owners or operators of a farm, children working on farms with their parents, children working on farms without their parents but with their parents' permission, children working on small farms, and instances where the employer obtains a Labor Department waiver of age restrictions.

A child of 12 or 13 may work where a parent or guardian (a) consents to the child's employment or (b) is employed on the same farm as the child.

A child who is less than 12 years old may also work where (a) the child is employed by his parent or guardian on a farm owned or operated by his parent or guardian *or* (b) the child is employed, with the consent of his parent or guardian, on a

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[12] "Outside of school hours," according to USDOL interpretive regulations in 29 C.F.R. § 570.123(b), "generally may be said to refer to such periods as before or after school hours, holidays, summer vacation, Sundays, or any other days on which the school in the district in which the minor lives does not assemble."

farm which employed fewer than 500 man-days of labor (i.e., about 7 full-time employees) in any quarter in the previous year.[13]

Another exception to the normal minimum age of 14 is called the "tiny tots" provision. Under it, employers may apply to the Secretary of Labor for a waiver of the age restriction to employ children 10 and 11 years old as hand-harvest laborers for no more than eight weeks in a year. Unlike the other age exemptions, this one is not self-executing. Employers may not take advantage of this exemption unless they receive express permission from USDOL. USDOL has not given permission to use young workers under this provision for more than a decade.

A child who is working on a farm owned or operated by his or her parent or guardian is restricted only by the requirement that she must work outside of school hours. As a result, such children can freely engage at any age in any agricultural tasks, even those that the Secretary of Labor has found to be particularly hazardous. This regulatory approach in agriculture is far different from that which applies in all other industries, in which the hazardous orders (barring employment of children below the age of 18) apply to *all* children, including those employed by their parents.

The policy choices embodied in the FLSA reflect the congressional judgment concerning the appropriate level of protections to be accorded to children working in agriculture. Minimum age levels enacted into the statute cannot be overridden by regulations issued by the Secretary of Labor. Thus, even though the Secretary of Labor has expressly found that certain agricultural occupations are hazardous and constitute oppressive child labor if performed by children under 16 years old, Congress has permitted parents who own or operate a farm to subject their children to these hazards at their own discretion. The apparent justification for this exception is that the parent in such a situation would be vigilant to protect the child. As shown by the studies of farm accidents and injuries, however, this rationale is contradicted by the facts. Many farm deaths and injuries to children under age 16 are caused by tractors and farm machinery, which the Secretary of Labor has designated as hazardous for young workers. In short, Congress' failure to apply hazardous orders to children working on farms owned or operated by their parents is hard to justify.

Similarly, the other statutory exemptions allowing young children to work in agriculture do not appear to rest on a sound foundation. The rationale for allowing children as young as 12 to work on a farm where their parents are working appears grounded on the assumption that the parent would work alongside the child and thus be able to protect the child from workplace hazards. But this justification, too, is contradicted by the fact that neither the statute nor the Labor Department regulations

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[13] A "man-day" is defined in Section 3(u), 29 U.S.C. § 203(u), to mean "any day during which an employee performs any agricultural labor for not less than one hour." In counting the number of individuals who are employed in agricultural labor, immediate family members are excluded (e.g., a parent, spouse, or child). Five hundred man-days is the equivalent of about seven or eight full-time employees in a calendar quarter (i.e., 1 hr. x 5 days/wk x 7.69 employees x 13 weeks/quarter = 500 man-days).

require that a parent accompany the child at work or work nearby. Thus, the parent may be nowhere near a child and could provide no assistance in case of danger.

The policy of allowing children as young as 12 to work as long as their parents consent presumably rests on the assumption that a parent is in the best position to judge whether the child can handle the rigors of farm work at an early age. This is an unusual deferral to parental authority, since under the FLSA, it is only with regard to agriculture – and not general industry – that parents are given the freedom to consent to young children working. Here, too, it is likely that this exemption is based on the persistent notion that agricultural employment is perceived to be wholesome, nurturing, and safe, rather than on an objective analysis of the risks children face.

2. Hazardous Occupations

The FLSA authorizes the Secretary of Labor to designate certain occupations as hazardous and as constituting "oppressive child labor." Agricultural tasks which have been designated as "hazardous" generally cannot be performed by young workers who are less than 16 years old (29 C.F.R. § 570.71, attached as Appendix B). In "hazardous orders," the Secretary of Labor has found the following agricultural activities (among others) to be hazardous to young workers:

- operating equipment, such as tractors over 20 horsepower, corn pickers, cotton pickers, grain combines, hay mowers, etc.
- working in yards, pens or stalls that are occupied by a bull, boar or stud horse;
- felling, skidding, loading, or unloading timber
- working from a ladder or a scaffold, including picking fruit, at a height of over 20 feet
- driving a bus, truck or car when transporting passengers, or riding on a tractor as a passenger or helper
- working inside fruit, forage or grain storage containers
- handling or applying pesticides in Toxicity Category I or II

However, under Section 13(c)(2), age restrictions concerning hazardous work do not apply where a child is employed on a farm owned or operated by a parent or guardian. Minors ages 14 or older who have received training through 4H or vocational education are also permitted to do some hazardous work.

3. Hours

In the FLSA, there are no restrictions on agricultural work being done early in the morning or late at night. Nor does FLSA contain any restrictions on the number of hours

worked per day or per week for young farm workers (except that no work can be done during school hours for workers under age 16).

These rules stand in sharp contrast to the approach adopted by the Secretary of Labor in the retail, food service, and gasoline service station industries. In these three nonfarm industries there are strict limitations on hours, based upon findings by the Secretary of Labor that longer hours may interfere with children's schooling and their health and well-being. Under 29 C.F.R. § 570.35(a), children aged 14 and 15 in these three industries are confined to the following hour restrictions. Work must be performed:

-- outside of school hours

-- not more than 40 hours in a week when school is not in session

-- not more than 18 hours in a week when school is in session

-- not more than 8 hours in a day when school is not in session

-- not more than 3 hours in a day when school is in session

-- between 7:00 a.m. and 7:00 p.m. in any day, except during the summer (June 1 through Labor Day) when the evening hour will be 9:00 p.m.

The contrasting treatment of agriculture and retail services can be seen in sharp relief in the context of a specific day. Take, for example, Monday, September 13, 1999. A cashier in an air-conditioned fast-food restaurant, as young as 14 or 15 (but no younger), cannot work when school is in session, cannot work more than three hours that day and cannot work prior to 7:00 a.m. or later than 7:00 p.m. A hand-harvester of strawberries, on the other hand, is only prohibited from working during school hours. She can be required to start work early in the morning and work late into the night and work an unlimited number of hours. Moreover, she can be 12 years old or younger in certain situations. Since the Secretary of Labor has found that a more demanding schedule in fast-food employment would interfere with a 14- and 15-year-old child's schooling and health, it is hard to justify the absence of such hour restrictions in agriculture.[14]

4. Remedies

Enforcement of the FLSA's child labor provisions is entrusted to USDOL's Wage and Hour Division. Due to limited resources, the Labor Department has assigned relatively few investigators to target child labor violations. With a limited number of investigators – and weak statutory provisions to enforce – it is not surprising that not many violations have been found (USGAO, 1998:6).

[14] The deleterious effect of working in agriculture on the educational attainment of farmworker children is well documented (Commission on Security and Cooperation in Europe, 1993:90-102).

When violations are found, the Secretary of Labor can obtain redress through injunctive relief, civil money penalties, and criminal sanctions.

Injunctive relief. Under Section 17 of the FLSA, 29 U.S.C. § 217, the Secretary of Labor is authorized to file suit in federal district court to enjoin child labor violations committed by employers. *Shultz v. Salinas*, 416 F.2d 412 (5th Cir. 1969), provides an example of one effort to do so in agriculture. There, a farm labor contractor who recruited workers to harvest peaches and tomatoes was found by the U.S. Department of Labor to have employed children under age 16 to work during school hours, in violation of the FLSA. USDOL filed a lawsuit to enjoin this practice. The contractor then signed a written stipulation agreeing to future compliance, and USDOL dropped the suit. Several years later, when USDOL found identical violations by the same contractor, it filed suit again seeking an injunction. The federal district court, however, refused to grant one, on the ground that the contractor had taken adequate steps to assure future compliance with the FLSA provisions by sending letters to his crew chiefs, instructing them not to hire children under age 16. USDOL appealed this ruling and it was reversed by the court of appeals. The appellate court held that the farm labor contractor's steps were insufficient, noting that the contractor took no steps to see that his crew chiefs were following his instructions, that there was no evidence that the contractor had inspected farms where the crews were working, and that he had not checked production records of the families involved to see whether children under age 16 were working during school hours. The court of appeals also ruled that the contractor's previous noncompliance made any further promises of future compliance quite dubious, and hence ordered the district court to issue an injunction barring further child labor violations.

Child labor injunctions have the effect of fostering compliance with the law, but they require a laborious effort for a rather minimal result. In order to secure an injunction against a child labor violator, it is typically necessary to show that the violator is likely to violate the child labor provisions again. This ordinarily requires a showing that there has been previous violations or that the first-time violations are so egregious that the violator should not be given a second chance. Even when an injunction is issued, it requires only that the violator comply with the law in the future. It is only if the violator fails to adhere to the requirements of an injunction that a more severe penalty is likely to be imposed. If the injunction isn't followed, the violator can be held in contempt of court. In case of a blatant violation, the court may impose additional requirements on the violator in order to make future compliance more likely. For example, the court may require that the violator send proof of age of any child under age 18 to the U.S. Department of Labor before being authorized to hire a young worker. The point of this or any other such restriction would be to assure, insofar as possible, that no further child labor violations occur.

A more effective kind of injunctive remedy that is available to the Secretary of Labor is the "hot goods" injunction. Under the FLSA, goods produced in places in which child labor violations have occurred cannot be shipped in interstate or foreign commerce, because such a shipment is deemed to "pollute" the channels of trade with "tainted" goods. Specifically, Section 12(a) of the FLSA, 29 U.S.C. § 212 (a) provides: "No

producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed . . . ." Any producer, manufacturer, or dealer who violates this provision can be enjoined from shipping the tainted goods in interstate commerce. Importantly, because of the taint, any shipment of such goods is considered to result in irreparable harm, thereby enabling USDOL to seek a temporary restraining order ("TRO") against any commercial entity who is in possession of the goods. Courts can issue a TRO on the same day that it is sought, or within a day or two thereafter, thereby barring further shipment of goods until the matter is resolved.

A concrete example will illustrate how the hot goods TRO remedy greatly enhances child labor protections. Suppose that during a grape harvest from September 1, 1999, to September 15, 1999, a few children were employed in violation of the FLSA's child labor provisions. As a result, all the grapes harvested during that two-week period (not just the grapes harvested by the illegally employed children) are considered hot goods. Prior to October 15, 1999 (i.e., within thirty days of the last child labor violations which occurred on September 15, 1999), anyone who seeks to ship these grapes in interstate commerce, or deliver them for shipment by someone else in interstate commerce, has violated the FLSA's hot goods provisions and is subject to a lawsuit in which USDOL can secure an emergency court order barring shipment or delivery of the grapes. Because of the importance of bringing the grapes to market promptly, there is great pressure on not only the employer of the harvesters, but also on the processors, packers, wholesalers, distributors, and retailers "downstream," to resolve the case as soon as possible. Although technically none of the grapes can be shipped until the end of the thirty-day period (i.e., October 15, 1999), USDOL typically adopts a pragmatic approach and allows shipment of the grapes when the offending party pays any civil money penalties that were assessed and agrees to the imposition of further measures that foster future compliance with the child labor requirements. The offending party could, for example, be required to report to USDOL various details about any employees under age 18, so that USDOL could monitor the situation in the future. For an example of such a court order in an FLSA wage violations case, see *Herman v. Fashion Headquarters, Inc.*, 992 F.Supp. 677, 681-82 (S.D.N.Y. 1998).

In the agricultural sector, USDOL has shown some reluctance to take advantage of the hot goods remedy because of concerns about the perishability of farm products. These concerns are largely unfounded for two reasons. First, hot goods cases are frequently resolved so promptly that the affected goods could start moving again within a few days. For many crops, such a slight delay would have little or no effect on freshness and marketability. Second, there have been many technological advances that help to prolong freshness. Among these are the "flash-cooling" of crops such as apples and the storage (and even the shipment) of produce in "controlled atmosphere" units where the reduction of oxygen and the increase of nitrogen in the air help to retard spoilage. Greater use of the hot goods TRO by USDOL would lead employers – and others who benefit financially from child labor violations – to heed the FLSA's child labor requirements more assiduously.

Civil money penalties. Civil money penalties for child labor violations were added to the FLSA by Section 16(e), 29 U.S.C. § 216(e), in 1974, which provided for a penalty not to exceed $1,000 for "each violation" of the child labor provisions. This provision was amended in 1990 by providing that a penalty instead be imposed for "each employee" who experiences any child labor violation, and increasing the maximum penalty amount to $10,000 (Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3103(1)(B), 104 Stat. 1388 (1990)). The size of the penalty depends on the size of the business charged and the gravity of the violation.

Civil money penalties are assessed by the Secretary of Labor by means of a formal notice to the offending employer. The employer may request a hearing before an administrative law judge (ALJ) by contesting the penalties that have been assessed. If the employer fails to make a timely request for an ALJ hearing, the penalties become final and non-appealable. In the event of a timely request, an ALJ schedules a hearing and issues a ruling. The employer may appeal an ALJ ruling to the Secretary of Labor, who will then issue the final determination of the U.S. Department of Labor. If the employer fails to pay the civil penalty found due by a final decision of the Department of Labor, the amount due may be collected by (1) deducting it from sums that the United States owes the employer, (2) recovering it in a civil action brought by the Department of Labor in court, or (3) securing a court order in a child labor injunctive action requiring the employer to pay the civil penalty.

Criminal penalties. The third remedy available to the Secretary of Labor is a criminal prosecution against the offending employer, as authorized by Section 16(a) of the FLSA, 29 U.S.C. § 216(a). The penalty upon conviction is a fine of not more than $10,000 or imprisonment for not more than six months, or both. A person cannot be imprisoned unless he or she has been convicted previously of a violation. Criminal prosecutions are under the control of the Attorney General and are brought by a United States Attorney in federal district court. Very few criminal cases have ever been brought in child labor cases.

All three of these remedies have a deterrent effect upon employers, but it is unclear how great the deterrent has been. The raising of the maximum civil penalty amount from $1,000 to $10,000 suggests that Congress believed that the original monetary deterrent was not sufficient. Senator Harkin (D-Iowa) introduced a bill, S. 2383, in July 1998 that would increase the maximum civil penalty to $15,000, and establish a minimum penalty of $500. The Harkin bill would amend the criminal provisions by increasing the maximum fine to $15,000 and the maximum prison term to five years in particularly severe cases. This legislation has yet to be enacted.

B. State Child Labor Laws

State child labor laws vary greatly in their scope, their coverage, and their specific protections. All states have child labor laws, but some state laws exempt agricultural employment. In those states where agriculture is covered, there have been a number of

approaches. Some are more protective of children than the federal law; others adopt the FLSA protection for small farms; and still others provide a lesser degree of protection on small farms. A chart summarizing all state child labor laws can be found in Appendix C.

The FLSA child labor provisions do not pre-empt state child labor laws that are more protective than the federal provisions. Indeed, Section 18(a) of the FLSA, 29 U.S.C. § 218(a), provides that "no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act." Accordingly, where an applicable state law is more protective of children than the FLSA's child labor provisions, the state law governs. A state cannot set lower standards of protections on farms regulated by the FLSA, i.e., farms employing more than 7 full-time employees. Nonetheless, states may establish lesser protections on small farms that are not governed by the FLSA standards.

Only 14 states completely exempt agriculture from any protection under their child labor laws. The other 36 states vary widely in their requirements and standards for minors working in agriculture. Many of these standards are subject to exceptions or only apply to certain categories of workers. (See Appendix C.)

1. Minimum Ages for Employment

The FLSA imposes minimum age requirements on the employment of minors. See Section V.A., above. However, since not all farms are subject to federal child labor laws and some state laws are more protective than the FLSA, the age limits of the individual states are important.

Of the 36 states that regulate agriculture, 7 states impose no statutory minimum age requirement for work done during non-school hours. Of the 29 remaining states, one state – Illinois – sets the minimum age at 10 years old. Nine states set the minimum age at 12 years old, although 2 lower or waive the age limit for minors who have parental consent. Michigan sets the minimum age at 13, but its minimum age only applies to operations involving detasseling, roguing, hoeing, or similar activities concerning the production of seed. Eighteen states set the minimum age at 14, but half of those states only apply the restriction to certain categories of minors (e.g., seasonal farm workers in Pennsylvania, minors working more than 20 hours per week in Iowa, those working in hazardous situations in Delaware and Maine, etc.) or lower the age limit in specified circumstances (e.g., 10 for coffee harvest in Hawaii, 10 for hand harvest of crops in North Dakota, 12 for hand harvest of berries and vegetables in New York and Washington, 12 if parental consent is given in Vermont and Virginia, 12 if migrant laborer in Iowa, etc.).

During the hours that school is in session, some states alter the minimum age for employment. Six states set the minimum age limit higher than the federal standard of 16, while the remaining thirty states are at least as permissive of employment during school hours as the FLSA.

Five of the six states with a higher age standard – California, Hawaii, Kansas, Washington, and Wisconsin – prohibit all minors under age 18 from working during school hours. These states generally waive this restriction for minors of age 16 or 17 who have graduated from high school or are no longer required to attend school. The sixth state, Maine, has a similar prohibition against employment during school hours that applies to minors younger than 17 years old who work in contact with hazardous machinery or substances.

Eighteen states have exactly the same age restriction for farm employment during school hours as does the FLSA. Two states – Nevada and North Dakota – allow children to work in agriculture during school hours beginning at age 14. Ten other states set the minimum age at 16 but only for certain categories of minors (e.g., seasonal workers, full-time workers, hazardous work, etc.); 4 of these 10 states lower the minimum age to 14 for minors who are not required to attend school.

2. Work Permits and Age Certificates

Federal law does not require work permits for minors working in agriculture, but approximately two-thirds of the 36 states that regulate child labor in agriculture require work permits or age certificates.

Twenty-one of the 36 states regulating agriculture require work permits for those under 18 years of age, although the circumstances invoking this requirement range widely. Two states – California and Washington – require work permits for all minors, while seven states require them for all minors fitting specific categories (e.g., working with hazardous materials, operating farm machinery, living in an agricultural labor camp, seasonal farm workers, or working during school hours). Alaska requires work permits for all minors under 17 years of age. Eleven other states require work permits for minors younger than 16 years old, although the requirement is often contingent on whether school is in session or the minor is a migrant farmworker.

Four states require that minors have age certificates – for minors under 18 in Alaska, Florida, and Minnesota, and for minors ages 16 or 17 in Hawaii. Four other states, Colorado, Missouri, Utah, and Virginia, provide that an employer can obtain age certificates for its employees upon request. One state, Connecticut, requires either a work certificate or proof of age for all minors under 16.

Of the 36 jurisdictions regulating agriculture, 5 states do not require employment permits or age certificates in any industry, and 6 states exempt minors in agriculture from any state requirements respecting work permits or age certificates.

3. Maximum Hours Per Day or Per Week and Maximum Days Per Week

The FLSA does not restrict the number of hours and days that may be worked by minors in agriculture. However, of the 36 states that regulate agriculture, 27 states set

standards respecting the number of hours and days that minors employed in agriculture may work. Two states set no such limits, and the 7 remaining states exempt agriculture from their child labor standards restricting the number of hours and days that may be worked.

Limitations on hours worked per day tend to vary depending on whether school is in or out of session. When school is in session, 10 states restrict the number of hours per day that minors under 18 may work in farm jobs: 2 states allow 4 hours on school days and 8 hours on non-school days or days preceding non-school days, while 2 other states use similar schemes but allow more hours per day; 2 states allow 10 hours per day; 2 states allow 8 hours per day; 1 state allows 4 hours per day; and 1 state allows 12 hours per day spent in school and work combined. When school is not in session, 8 states regulate hours worked per day: 5 states allow 10 or more hours per day and 3 states allow 8 hours per day.

Under the FLSA, when school is in session, minors under age 16 in non-agricultural jobs may work 3 hours on a school day and 8 hours per day on a non-school day. For agricultural jobs, 25 states apply restrictions to minors under age 16 when school is in session: 7 states apply the hour limitations used for nonfarm jobs under the FLSA, while 6 other states use a similar scheme but allow 1 or 2 more hours per day; 3 states allow a combined daily total of 8-10 hours spent in school and at work; 4 states restrict the hours that may be worked in a day to 4 hours or less; and 5 states restrict the hours to 8-10 hours per day. In agricultural jobs, 23 states restrict the number of hours that may be worked when school is out: 19 states prohibit working more than 8 hours per day, and 4 states prohibit working more than 9-10 hours per day.

In addition, New York limits 12- to 13-year-olds who pick berries, fruits, and vegetables to a maximum of 4 hours of work per day.

Restrictions on hours worked per week also tend to vary depending on whether school is in or out of session. When school is in session, 11 states restrict the number of hours per week that minors under 18 may work in farm jobs: 3 states allow 28-30 hours, 4 states allow 40 or more hours, 1 state allows 48 hours spent in school and work combined, 2 states (Maine and Wisconsin) allow 20-50 hours and 26-32 hours respectively (depending on how many days school is scheduled during the week), and 1 state (Oregon) limits minors employed to ride on power-driven farm machinery to 25 hours per week. When school is not in session, 10 states regulate minors' hours of farm employment per week: 2 states allow 40-44 hours, 3 states allow 48 hours, 3 states allow 50-54 hours, 1 state (Oregon) limits minors riding on power-driven farm machinery to 60 hours, and 1 state (Michigan) allows 48 or 62 hours (the larger number applying if the minor is working in the production of seed or in agricultural processing).

The FLSA allows minors in nonagricultural jobs under age 16 to work up to 18 hours per week when school is in session and up to 40 hours per week when school is out. No such restrictions are imposed on agricultural workers under the FLSA. However, many states apply some weekly hours restrictions for minors under age 16

working in agriculture. While school is in session: six states apply an 18 hour restriction to such youths, and one state (Florida) only allows 15 hours per week. Thirteen other states allow minors under age 16 to work 18-54 hours per week when school is in session. Massachusetts and Michigan statutes provide that youth under 16 may spend no more than 48 hours per week in school and work combined. When school is not in session, many states restrict the hours that farm workers under age 16 may work in a week: 14 states allow 40 hours (same as FLSA for nonfarm jobs), 1 state allows 44 hours, 5 states allow 48 hours, 1 state allows 54 hours, and 1 state allows from 44 hours to 60+ hours (depending on whether it is harvest season and whether the minor is employed to operate power-driven farm machinery).

Some notable exceptions to the hour restrictions given above are: Colorado, which allows up to 12 hours a day in seasonal employment for harvest work and care of perishable products where wages are paid on a piece rate basis; Hawaii, which allows 8 hours per day and 48 hours per week for pineapple harvesting; and Michigan, which exempts farming operations not involving detasseling, roguing, hoeing, or similar tasks concerning the production of seed, for those operations will apply special extended hours (11 hours per day, 62 hours per week, 7 days per week) for 16- to 17-year-olds if school is out and parental consent is given.

In nine states, minors employed in agriculture may work only 6 days per week, although in New Hampshire this restriction only applies to 16- and 17-year-olds who are enrolled in school. Eight more states prohibit minors younger than 16 years old from working more than 6 days in a week, and Hawaii limits those under 14 from working more than 5 consecutive days.

4. Restrictions on Work During Specified Hours

Under the FLSA, minors employed in nonagricultural jobs who are under age 16 may not work between 7 p.m. and 7 a.m., except between June 1 and Labor Day, when the restriction is only from 9 p.m. to 7 a.m.

In agriculture, the FLSA does not set any standards as to which hours of the day minors can work except that work cannot be done during school hours for those under age 16. Out of the 36 states that regulate agriculture, several states exempt minors in agriculture from their child labor laws concerning prohibited hours of the day, and a few states do not set restrictions on time of day. The remaining states have restrictions that are generally very similar to those of the FLSA for nonagricultural workers.

When school is in session, many states regulate the time of the day that may be worked by minors under age 18 in agriculture. Five states prohibit employment between 10:00 p.m. – 11:00 p.m. and 5:00 a.m. – 7:00 a.m. on days preceding school days. Six other states have similar restrictions in place for the entire week, except that on days not preceding school days, four of these states extend the evening hours so that minors may work until 12:00 a.m. – 1:00 a.m. (one of the four states also expressly prohibits working from 7 a.m. to 1 hour following the end of school). Delaware requires that all minors have 8 consecutive hours outside of work and school each day. Indiana prohibits

employment between 7:30 a.m. and 3:30 p.m. on school days unless the school issues an exception. New Hampshire prohibits night work between 8 p.m. and 6 a.m. in excess of 8 hours in a 24 hour period or 48 hours in a week.

Several states regulate the hours that may be worked by all minors under age 18 in agriculture when school is not in session. Two states prohibit work between 12:00 a.m. – 12:30 a.m. and 5 a.m., and one state prohibits work between 10:00 p.m. and 5 a.m. Two states require that minors have an 8-hour rest period from the end of work one day to the beginning of work the next day. New Hampshire prohibits night work between 8 p.m. and 6 a.m. in excess of 8 hours in a 24 hour period or 48 hours in a week. In Michigan, minors may only work from 6 a.m. to 11:30 p.m., except that if they are working in the production of seed or agricultural processing and they have parental consent, they may work from 5:30 a.m. to 11:30 p.m.

When school is in session, more than 20 states set standards for prohibited hours for minors under 16 employed in agriculture: 5 states follow the FLSA nonfarm standard (no work between 7 p.m. and 7 a.m., with an extension to 9 p.m. from June 1 to Labor Day); 11 states have limits which are similar to the FLSA nonfarm standard, but extend the permitted hours, allowing employment starting at 5:00 a.m. – 7:00 a.m. and ending at 7:00 – 10:00 p.m.; 5 states allow employment starting at 5:00 a.m. – 6:00 a.m. and ending at 8:00 p.m. – 10:00 p.m., lessening or removing these restrictions on days that do not precede school days; and 2 states prohibit work between 7 p.m. and 7 a.m. even during the period from June 1 to Labor Day. When school is not in session, approximately 20 states regulate the hours that minors under age 16 may work in agriculture: 10 states prohibit them from working between 9 p.m. and 7 a.m.; 7 states prohibit employment between 9 p.m. and 5:00 a.m. – 6:30 a.m.; and 3 states prohibit employment between 10:00 p.m. – 11:00 p.m. and 5:00 a.m. – 7:00 a.m.

In addition, 2 states have laws specifically affecting 12- to 13-year-olds. New York prohibits them from working between 4 p.m. and 9 a.m., except during the period from June 21 to Labor Day, when they may not work from 7 p.m. to 7 a.m. Washington prohibits work between 8 p.m. and 5 a.m., although on days not preceding school days, work may be extended to 9:30 p.m.

5. Hazardous Occupations

Of the 36 states regulating agriculture, a few states exempt agriculture from their regulation of hazardous occupations. Approximately half the states have restrictions on hazardous occupations that are the same or nearly the same as those issued under the FLSA. Several states have general restrictions on certain occupations which are not specifically agricultural but may be tasks performed on farms.

A few states have a general restriction applicable to all minors under 18. For example, Wisconsin prohibits working in confined spaces, Ohio restricts the use of certain chemicals (e.g., fertilizers, fungicides, insecticides, rodenticides, and herbicides), Connecticut and Florida limit work done on ladders, and four states restrict motor vehicle

occupations (i.e., driver or outside helper) and using heavy equipment. Alaska proscribes the operation of power-driven machinery such as circular and band saws and hoists by minors younger than 17 years old, while it prohibits minors under age 16 from work on ladders or with sharp tools. Several states have non-agriculture specific restrictions affecting minors under age 16; some states do not permit such minors to operate or maintain machinery (although Arkansas makes a specific exception for seasonal agricultural hand labor), a few states restrict the operation of motor vehicles, and other states limit exposure to dangerous chemicals, work on ladders and scaffolding, or work sorting tobacco.

Several states have regulations that specifically restrict certain hazardous occupations in agriculture for minors under age 18. Four states do not permit minors to operate certain motor vehicles on farms, including forklifts, tractors, and hay balers, although exceptions are made if certain safety or use conditions are met. A few states impose limitations on exposure to dangerous chemicals, including pesticides. Several states regulate the use by minors of power-driven machinery such as hoisting apparatus and power saws, and a few states limit occupations involving slaughtering. New Jersey and Iowa restrict the operation of power cutters. Massachusetts restricts work performed more than 30 feet above the ground.

Of those states that impose agriculture-specific regulations on minors under 16 years old, almost all restrict the use or cleaning of certain types of power-driven machinery (e.g., saws, cutters, and hoists) and/or operating or helping on motor vehicles. Delaware, Massachusetts, and Pennsylvania[15] do not permit minors younger than age 16 to strip or sort tobacco, and Oregon limits the work of minors under age 16 with respect to cattle handling, grain elevators, and any workplace with power-driven machinery adapting goods for sale. Hawaii prohibits 15-year-old pineapple harvesters from being on the harvesting machine or a truck attached to it.

California does not allow minors under 12 years old to work in "agricultural zones of danger" (i.e., on or around moving equipment and near unprotected chemicals and water hazards). Hawaii prohibits coffee harvesters under age 12 from using any equipment other than holding hooks and containers and from carrying any loads heavier than 15 pounds.

Most states will allow a minor age 16-17 to perform any hazardous occupation if the minor is working on a farm owned or operated by a parent or guardian. However, several states limit this exemption to only some hazardous occupations or, like Hawaii, provide no exemption at all for minors working for their parents in hazardous occupations. Massachusetts allows minors under 16 to operate saws or cutters on a family farm, but does not make a similar exception for picker machines (used in picking cotton or wool), tobacco operations, or work on motor vehicles in any capacity. Virginia expressly prohibits the employment of all minors under age 18, even those employed on a family farm, in any gainful occupation that exposes them to a recognized hazard capable of causing serious physical harm or death.

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[15] Pennsylvania's restriction only applies to seasonal farmworkers.

C. OSH Act, FIFRA, and FQPA

Federal statutes regulating related issues may afford some protection to youth workers in agriculture. They include the OSH Act, FIFRA and FQPA.

Occupational Safety and Health Act. Under the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 ("OSH Act"), and its implementing regulations, the most important provision affecting hired farmworkers, including child farmworkers, is the Field Sanitation Standard ("FSS"). The FSS was promulgated in 1987 in the wake of a lawsuit brought by the Farmworker Justice Fund. *See* 52 Fed. Reg. 16050 (May 1, 1987), 29 C.F.R. § 1928.110. It requires that employers of 11 or more hand laborers provide, without cost to employees, "suitably cool" drinking water in sufficient amounts as well as one toilet and handwashing facility for each 20 employees (or fraction thereof) within one quarter of a mile of the worksite in the field. These basic facilities are necessary to reduce the risk of heat stress/heat stroke, pesticide exposure, urinary tract infection and parasitic disease. At the time the Field Sanitation Standard was issued, OSHA estimated that 36 percent of hired farmworkers would be covered by the federal standard. Some states have applied one or more of the FSS's requirements to farms with fewer than 11 employees. Notably, California requires *all* farms within that state to provide the full complement of field sanitation protection. Virginia is not as protective, requiring small farms to provide only drinking water.[16]

Another OSHA regulation that directly affects agricultural employees, both children as well as adults, relates to tractors. As noted in Part IV above, tractor accidents account for a large number of fatal and disabling injuries. Many of these accidents occur when a tractor hits a rock or a slope and turns over. Even if it rolls over, serious injuries can be prevented when a tractor is equipped with a rollover bar or a similar device, which are known as roll-over protective structures ("ROPS"). By federal regulation, all tractors manufactured after October 25, 1976, must be equipped with ROPS. However, because many pre-1976 tractors remain in use, hazards persist. Retrofitting older tractors with ROPS is a modest expense in comparison with the costs, both financial and emotional, of the deaths and injuries that tractor rollovers can cause. Nonetheless, farmers have fought state and federal regulatory efforts to require retrofitting and continue to use older equipment without this potentially lifesaving device.

There are many other OSHA standards that could protect all farmworkers, including children on the farm, but most of these standards do not apply to agricultural workplaces. Among the many OSHA standards that exempt agriculture are protections against electrocution and unguarded machinery, requirements to inform employees about work hazards, and whistle-blower protections. 29 C.F.R. pt. 1910. There are only seven OSHA standards in 29 C.F.R. pt. 1910 that do apply in agriculture (see 29 C.F.R. §

[16] Under the U. S. Environmental Protection Agency's Worker Protection Standard, any grower who has used pesticides within the past 30 days must provide handwashing water to all farmworkers employed at that establishment. 40 C.F.R. § 170.150.

1928.21 for a listing), and even these standards are of limited value because annual riders to USDOL's appropriations prohibit OSHA from regulating farms with fewer than 11 employees which do not maintain an active temporary labor camp.

Federal Insecticide, Fungicide, and Rodenticide Act. Under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA"), pesticides must be registered with the U.S. Environmental Protection Agency ("EPA") in order to be sold or distributed in the United States. EPA will register a pesticide if it determines, among other things, that its use will not cause unreasonable adverse effects to human health or the environment when used in accordance with its label. The principal means of achieving this goal is the EPA's risk assessment process by which pesticide active ingredients are tested for acute and chronic health hazards, as well as effects on non-target organisms and the environment. Risk mitigation measures are incorporated onto the product's EPA-approved label by way of directions, use restrictions, personal protective equipment requirements and precautions. States enforce these label requirements under cooperative arrangements with EPA.

The most important EPA regulation affecting hired farmworkers, which is incorporated by reference on the labels of all pesticides sold for commercial sue, is the Worker Protection Standard ("WPS"), 40 C.F.R. pt. 170. The WPS contains general provisions applicable to field workers and pesticide handlers (i.e., those who mix, load or apply pesticides). The most important provisions require basic pesticide safety training for all workers once every five years; prohibit the spraying of pesticides while any unprotected worker is in a field or may be exposed through drift; prohibit routine hand labor activities during specified restricted entry intervals; require that information about when and where pesticides have been applied is communicated to workers orally and/or in writing; require the provision of personal protective equipment for handlers and early entry workers; require that handwashing facilities, soap and towels be available to all workers for decontamination; and require the provision of transportation to a medical facility in case of emergency.

The EPA protects young agricultural workers from acute or chronic exposure to pesticides in two primary ways: through its risk assessment process and by mandating safe work practices. Because of the limitations of FIFRA, neither route produces adequate protection.

Risk assessments under FIFRA are governed by a cost-benefit analysis. Thus, even significant health hazards can be allowed to persist when these hazards are outweighed by the benefits of continuing to use the hazardous product.

The EPA also relies on the WPS to establish basic safety measures on farms. All too often, however, these requirements are honored in the breach. As the GAO pointed out, the EPA's oversight of state enforcement efforts is so lax that the Agency has not even articulated the requirements for a WPS inspection and cannot determine how many such inspections have been carried out (USGAO, 2000:22-23). Farmworker advocates have also been extremely critical of state enforcement efforts, noting that states often fail

to interview workers, fail to obtain or test leaf or product samples for pesticide residues, fail to acquire or examine medical records of victims and do not impose adequate penalties even when a serious violation is found (Davis and Schleifer, 1998, and Pesticide Action Network, 1999).

The case of Jose Antonio Casillas Balderas illustrates how the system can fail young workers with tragic consequences. Jose was a 17-year-old farmworker, who came to Utah in April, 1998, with his uncles to earn money to support his widowed mother and two younger siblings. On June 19, 1998, he was harvesting peaches when he was soaked with pesticides, being sprayed from a tractor about 10 feet away. Having never received any pesticide training – even though the WPS requires it – Jose thought that he had been sprayed with water. That night he slept in those same clothes and wore them all the next day (thereby increasing his exposure to the pesticides). Although he went to the clinic the next day complaining of a severe headache, the doctor only gave him a pain reliever.

A week later, Casillas was thinning apples when he was soaked again with pesticides. This time, he became nauseous, suffered from diarrhea, sweating and a severe headache. Instead of seeing a doctor, he just went home to bed. The next day, riding to work on his bicycle, he collapsed and died.

It appears that Jose was sprayed on both occasions with azinphos methyl, a toxicity category I insecticide. Azinphos methyl, like all organophosphates, affects the nervous system. A teaspoon full is enough to kill a grown man. None of the WPS protections that should have been available to Jose were actually implemented. By law, Casillas should have been trained; the field in which he was working should have been posted with warning signs; the employer should have taken him to a doctor immediately after he was sprayed, and the doctor should have been told that he was exposed to pesticides, so that he could have received the correct diagnosis and treatment. Proper precautions might have saved his life.

Food Quality Protection Act. The Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (codified in 7 U.S.C. §§136-136y and 21 U.S.C. §§ 301-346a) ("FQPA"), which was passed by a unanimous Congress, for the first time required the evaluation of pesticides used on food under a health-based standard. Under the FQPA, a pesticide may not be used on food crops unless the EPA determines that there is a reasonable certainty that its use will cause no harm to children or adults. In making this determination, the EPA must consider the general population's combined exposure to the pesticide through all non-occupational sources (e.g., through food, air, water, home and garden use, etc.). The EPA must also consider as a group the cumulative risk posed by all pesticides that have a common mechanism of toxicity (i.e., cause harm in the same way). Further in assessing the risks posed by a pesticide, the EPA must begin by adding an extra ten-fold (10X) margin of safety to protect infants and children. This extra 10X safety factor can be removed, left in place or increased, depending on the information available about a pesticide's toxicity to infants and children and the degree to which they are exposed to the product. The use of an additional 10X safety factor for children was recommended by the National Academy of Sciences (NAS) in its report, *Pesticides in the*

Diets of Infants and Children (1993). The additional 10X safety factor is needed, the NAS found, because the EPA's process of evaluating pesticides did not adequately protect infants and children who are more susceptible than adults to harm from some toxic chemicals and who have greater exposure than adults to pesticides in or on certain foods. The FQPA specifically regulates food tolerances (i.e., the allowable amount of a pesticide which can remain on food).

Differences between FIFRA and FQPA. Three examples will highlight the differences between the protections of FIFRA and FQPA. First, under FIFRA, agricultural workers can be exposed to a carcinogenic pesticide as long as the risk of cancer is found to be no more than 1 in 10,000. By contrast, under FQPA, the general public cannot be exposed to a carcinogenic pesticide where the risk exceeds 1 in 1,000,000. The danger to young workers is even greater than the risks EPA calculates for adult workers because cancer risk is evaluated on the basis of 30 years of exposure, and a child who begins farmwork at 10 may be exposed to agricultural chemicals over 40 or 50 years. Second, in assessing the risks of pesticide exposure to workers under FIFRA, the Agency does not aggregate different routes of exposure or consider the cumulative effect of pesticides which have a common mechanism of toxicity (i.e., organophosphate insecticides which affect the central nervous system in the same manner). By contrast, both of those protections are required in evaluating the risks to the general public under FQPA. Third, while the EPA will add an extra 10X margin of safety to protect non-working children under FQPA, no such added protection is given under FIFRA to protect young working children from exposure to the same product. The result is that pesticides may be banned from use on certain foods which are eaten in substantial amounts by infants and children, even though massive use of the same product will continue on a host of other crops despite comparable or greater risks to young workers (who may be exposed to far greater doses of the pesticide).[17] The EPA also fails to provide adequate protection to young workers when imposing risk mitigation measures, such as setting restricted entry intervals ("REIs"). In determining the extent of worker exposure, for purposes of establishing REIs, the EPA formula calls for dividing the amount of the pesticide residue on the crop by the weight of an "average" worker, i.e., an adult male weighing 154 pounds. REIs which are established in this manner are inadequate to protect 12-year-old workers, who may weigh no more than 100 pounds (33 percent less). Thus, as the GAO noted, the EPA's procedure for setting restricted entry intervals is inadequate to protect children working in agriculture (USGAO, 2000:16-17).

D. Other Laws

AWPA. The Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 ("AWPA"), provides safety protections to farmworkers, both youth and adults, regarding housing[18] and transportation. For example, under section 401 of

[17] This exact scenario occurred in 1999, when the EPA restricted the use of azinphos methyl on apples and peaches, but allowed continued use of the pesticide on dozens of other crops, despite high risks to agricultural workers, both children and adults.

[18] Employers or others who provide housing to migrant farmworkers must be licensed and must provide facilities that meet state or federal temporary labor camp standards.

AWPA, 29 U.S.C. § 1841, every agricultural employer, agricultural association, and farm labor contractor who provides transportation to migrant and seasonal farmworkers must adhere to certain standards relating to vehicle safety, use licensed drivers, and carry an insurance policy, liability bond or workers' compensation coverage. The vehicles covered by this provision are generally those used to transport farmworkers between their migrant labor camps and the fields in which they work, as well as from one field to another. The transportation provisions do not apply to tractors, combines, or similar machinery used in planting, harvesting, and cultivating. USDOL's vehicle safety regulations set detailed requirements, covering items such as brakes, tires, steering mechanisms, and seats. 29 C.F.R. §§ 500.104-500.105. Many of these requirements were adopted from the U.S. Department of Transportation standards. USDOL standards do not, however, require seatbelts.

A concrete example of how the AWPA provisions work can be seen in a van accident that occurred in Florida in 1989, in which several workers were seriously injured. The accident took place when a farm labor contractor, driving his own van, was taking the workers to secure employment for the following day. As the court noted in *Saintida v. Tyre*, 783 F. Supp. 1368 (S.D. Fla. 1992), the contractor did not have vehicle insurance, nor had he maintained workers' compensation coverage as is required by Florida law. As a result of this violation of AWPA, the contractor was held liable under section 504(c)(1) of AWPA, 29 U.S.C. § 1854(c)(1), for statutory damages of up to $500 per affected individual per violation and for actual damages (lost wages and medical bills) stemming from the accident. The court awarded over $85,000 in total damages. An employer's potential liability for both actual and statutory damages resulting from violations of AWPA creates a strong financial incentive to comply with AWPA's motor vehicle and housing safety standards because, as was seen in *Saintida,* compliance is far less expensive than paying damages to injured workers. These standards offer the possibility of protecting all agricultural workers, including children, from a major cause of injury and death associated with farm employment (i.e., transportation accidents). AWPA, like the FLSA, however, only applies to employers or farm labor contractors who employ more than 7 full-time workers so that not all farmworkers receive the benefit of AWPA's safety standards.

Tort claims for wrongful death or negligently inflicted injury. Under the laws of every state, the death or injury of a person that is caused by the negligence of another can give rise to a tort claim for damages. Where such a claim arises in an employment context, a tort claim may be barred if the employee is covered by workers' compensation insurance.

Fear of liability for death or injury to workers generally induces most employers to provide a reasonably safe workplace. A lawsuit for negligence, however, can be difficult to pursue, particularly for migrant and seasonal farmworkers, many of whom do not reside near where they work. Language barriers, unfamiliarity with U.S. law, and undocumented status may also keep many farmworkers from even attempting to pursue valid claims. Cutbacks in funding for legal services also make it difficult for farmworkers to find a lawyer to represent them. Nevertheless, for those farmworkers

who can take advantage of a tort action, the possibility of recovering medical expenses, lost wages, pain and suffering, and other damages constitutes a powerful remedy.

Tort cases in which child workers are injured or killed raise two particularly important issues. The first relates to children's immaturity in comparison with adults, especially their lesser ability to appreciate hazardous situations. In a tort case, defendants frequently argue that their liability should be reduced or eliminated because the victim was also negligent in causing the injury. Where a child is the victim, the courts of most states have been less willing to accept this contributory negligence defense, on the ground that the child's actions, negligent though they may seem to an adult, may not have seemed unreasonable to the child. The other important issue that can arise in a child worker tort case occurs when the employer's violation of a safety requirement or protective legislation is what causes an injury to the child. In such a situation, the employer's violative acts may be treated as negligence per se, thus establishing the employer's liability for the injury and resulting damages.

These principles are vividly illustrated in a South Dakota case, *Strain v. Christians,* 483 N.W.2d 783 (S. D. 1992). There, a 14-year-old boy, who was driving a tractor for a neighboring farmer, overturned the vehicle and was killed. Where, as here, the boy's parents had consented to his employment and the boy had had tractor safety training as specified in the FLSA child labor regulations, 29 C.F.R. § 570.72, the court found that there was no FLSA violation. However, the state Supreme Court found that South Dakota's more protective child labor provisions applied, and that there was a violation of the state law. The court also ruled that the employer of the boy could not raise the defense of contributory negligence on the part of the boy, and that the parents' consent to their son's employment did not bar their recovery in the wrongful death action. As the court explained, "[T]he policy behind child labor statutes is to penalize employers who employ children in violation of the statute, not to impose a penalty on parents for permitting such employment." 483 N.W.2d at 790. As such, the court let stand a jury award of $75,000 in damages to the boy's parents.

Workers' compensation. Workers' compensation is a system of employer-financed insurance that provides medical coverage and wage replacement benefits to employees who suffer a work-related injury or illness. Benefits are available on a no-fault basis, so that an injured worker can qualify whether or not his employer or a co-worker were at fault in causing the accident and even if the worker's own inattentiveness contributed to the injury. Employees who suffer from a job-related injury or illness can turn to workers' compensation for: 1) cash benefits to temporarily replace some or all of their lost wages; 2) medical benefits to cover physician, surgical, pharmaceutical and hospital-related expenses; 3) cash subsistence when a worker is permanently wholly or partially disabled; 4) vocational rehabilitation services to retrain a disabled worker; and/or 5) death benefits to cover burial expenses and provide cash to a surviving spouse, children or other dependent relatives.

While the benefit levels are lower than a worker might receive from a private lawsuit arising out of negligence, access to workers' compensation benefits is more

certain for an injured employee than is recovery in such a lawsuit. The system is also supposed to quickly resolve claims. Unfortunately, workers' compensation systems often do not achieve this goal. While short-term medical bills are usually paid fairly promptly, the more serious and long-term the injury or illness, the more likely it is that the resolution of the claim will involve prolonged litigation.

Not all farmworkers are covered by workers' compensation insurance. In 12 states, the District of Columbia, Puerto Rico, and the Virgin Islands, farmworkers must be covered by workers' compensation to the same extent as other workers. These jurisdictions are: Arizona, California, Colorado, Connecticut, Hawaii, Idaho, Massachusetts, Montana, New Hampshire, New Jersey, Ohio, and Oregon. Generally, such coverage would include migrant and seasonal workers as long as they are employed by the grower for several weeks or months. By contrast, day haul workers, who are only hired for a day at a time, would be considered to be "casual" workers who are normally excluded from coverage.

In 13 states, coverage of farmworkers is not required by state law. Employers, however, may still choose to offer workers' compensation insurance. The states which do not require coverage are: Alabama, Arkansas, Indiana, Kansas, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Rhode Island, South Carolina, and Tennessee. Even in these states, employers must provide workers' compensation, or equivalent insurance under federal law, to farmworkers employed under the H-2A temporary foreign worker program.

The remaining jurisdictions provide varying degrees of coverage for farmworkers. In some states, partial coverage encompasses most farmworkers, in others the majority of farmworkers are excluded. For example, in Florida and Maryland only very small farms are exempt from mandatory coverage. By contrast, Maine does not require farmers to cover agricultural workers unless they work year round, thus excluding migrant and seasonal farmworkers.

There are two aspects of workers' compensation laws affecting child workers that deserve particular mention. First, if children employed in violation of the child labor laws are injured or killed on the job, special considerations apply. In some states the normal award of compensation is increased, ranging from a 25 percent increase in Oregon to a trebling of the award in Rhode Island and Wisconsin. In *Boardman's Case*, 365 Mass, 185, 310 N.E.2d 593 (1974), as an example, an illegally employed minor was injured while unloading hay from the front-end loader of a tractor. The minor's award of benefits was doubled, in accordance with Massachusetts law, because of the child labor violation.

Second, a handful of states accord a child who is injured or killed while working in violation of child labor laws the option of filing a workers' compensation claim or pursuing a lawsuit for negligence. In New Jersey the state statute expressly authorizes these alternative remedies. *Thompson v. Family Godfather, Inc.*, 212 N.J. Super. 270, 514 A.2d 875 (Super. Ct. Law Div. 1986), is an example of this approach, involving a 13-

year-old boy who was injured while operating a power-driven dough machine. In some states this election of remedies was created by the courts rather than by statute. For example, in Connecticut, the state Supreme Court, in *Blancato v. Feldspar Corp.*, 203 Conn. 34, 522 A.2d 1235 (1987), overruled a 1944 precedent and held that an election of remedies was permitted. As the court pointed out, the employment of a child in violation of the child labor laws is a contract, whether written or oral, in violation of the strong public policy to protect children from the hazards of jobs they should not be doing. Such contracts, the *Blancato* court added, should be unenforceable and voidable, so that the employer cannot use the contract of employment as a shield against a tort claim by the injured child (or, in the case of death, the child's parents). The right to file a workers' compensation claim should remain an option, but there must also be an option to file a tort claim if the injured party or parties decide to take that course.

Not all states in which the statute is unclear as to whether an election of remedies is available have adopted the Connecticut approach. In South Dakota, for example, the state Supreme Court concluded that this was a decision that should be left to the legislature. *Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370 (S.D. 1991). Allowing injured child workers the option to pursue a personal injury lawsuit puts a powerful tool in the hands of those who are most affected by the child labor violation. By enacting a statute that adopts this approach, a state could create a great financial incentive for employers to comply with the child labor laws.

Labor relations statutes. Labor relations laws generally give employees the right to join together to improve their wages and working conditions, by forming labor unions and engaging in collective bargaining. To the extent that such concerted activities lead to improved working conditions for all employees, such activities offer the possibility of enhancing protections for child workers over and above what any statute may provide. The National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"), gives employees the right to engage in concerted activities for the purpose of mutual aid and protection. Section 8(a)(1) of the NLRA, 29 U. S.C. § 158(a)(1), forbids employers from interfering with, restraining, or coercing employees in their exercise of this right. Under these provisions, employees can join together to complain to their employer about hazards in the workplace, excessive hours of work, and other working conditions to which they object. Unfortunately, farmworkers do not enjoy these rights, because a major exception in the NLRA deprives farmworkers of the law's protections. See Section 2(3) of the NLRA, 29 U.S.C. § 152(3).

Some labor relations laws at the state level do offer protection to agricultural workers. California has the most comprehensive statute, the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975, as amended, Cal. Lab. Code §§ 1140-1166.3. Arizona also has a labor relations act for agriculture, the Arizona Agricultural Employment Relations Act of 1972, as amended, Ariz. Rev. Stat. Ann. §§ 23-1381 - 23-1395. The Arizona law, however, has a distinctly pro-employer bias, and indeed was declared unconstitutional by a federal district court because of its restrictions on voting by farmworkers and on publicity about labor actions. That ruling, unfortunately, was overturned by the U.S. Supreme Court in *Babbitt v. United Farm Workers Nat'l Union*,

442 U.S. 289 (1979). The Arizona law, among other things, prevents farmworkers from voting in a representation election unless they worked for the same employer during the previous calendar year, limits the right to strike, and has other provisions that make it difficult for farmworkers to organize in Arizona.

Throughout the United States as a whole, very few farmworkers are unionized. One estimate puts the number at 1-2 percent (Villarejo, 1999:617).

Overtime compensation provisions of the FLSA. Under Section 13(b)(12) of the FLSA, 29 U.S.C. § 213(b)(12), "any employee employed in agriculture" is exempt from overtime compensation. As a result, whereas employees in other industries enjoy premium overtime wages of one-and one-half times their regular rate of pay for any hours in excess of 40 worked in a workweek, agricultural workers are not entitled to this benefit. Because migrant and seasonal farmworkers don't receive overtime pay, they face severe financial pressures which leads some to encourage their children to work to contribute to the family income.

The overtime exemption was originally enacted out of congressional concern for the highly seasonal nature of agricultural work, resulting in long hours during the harvest and other peak seasons. Congress also viewed agriculture as comprised of small businesses that are buffeted by drought, great price variations, and other uncertainties. Since the enactment of the first child labor protections for farmworkers in the FLSA in 1966, there have been many changes in agriculture that have made the overtime compensation exemption much more difficult to justify. Farms are much larger now, with sizable corporations rather than family farmers owning most of the commercial acreage and employing large numbers of workers. For example, while 20.4 percent of all farms in 1982 had 2,000 acres or more, by 1997 29.7 percent of all farms were of this size (U.S. Department of Commerce, 1984, 1998). This represents an increase of over 45 percent in just 15 years. To excuse all farms from paying time and one-half overtime compensation – even large ones – can no longer be justified. The agricultural exemption should be repealed as an anachronistic vestige of the past.

In California agricultural workers are paid overtime compensation for hours worked in excess of 10 hours in a day or 6 days in a week as a matter of state law.

Minimum wage provisions of the FLSA. Certain small farms are exempt from paying the FLSA minimum wage under Section 13(a)(6)(A), 29 U.S.C. § 213(a)(6)(A). This exemption applies to agricultural employees who did not, "during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor . . ." This exemption was plainly enacted on the theory that small farms are less able than large ones to pay the wage costs imposed by the federal minimum wage. Of course, those who work on small farms do not have any less of a need than those who work on large farms to earn at least $5.15 per hour.[19] Moreover, it should be noted that a

[19] The current FLSA minimum wage of $5.15 per hour took effect on September 1, 1997. Legislation is pending in Congress that would raise this rate to $6.15 per hour in stages over a two- or three-year period, but no increase has yet been enacted.

minimum wage and overtime exemption for small retail businesses, which like the small farm exemption had been a part of the FLSA for many years, was repealed in 1990. It is time to reconsider whether there is any further need for the small farm exemption in agriculture.

Certain states, like California, have state minimum wage laws which do apply to agriculture even when the FLSA provision does not.

VI. RECOMMENDATIONS FOR ENHANCED LEGAL PROTECTIONS

Given the number of deaths and injuries to young agricultural workers, it is beyond dispute that neither the legal protections afforded them by current law nor the health and safety training they receive is adequate to protect them. Consequently, we recommend the following changes:

1. Agricultural workers should be prohibited from engaging in hazardous work until they are 18 years old, as is the rule in other industries. The discriminatory provisions in the Fair Labor Standards Act cannot be justified. The FLSA should be amended by Congress to provide that all children working in agriculture, including those who are employed by a parent or guardian, must be 18 years old before they can engage in hazardous agricultural work.

2. The Secretary of Labor's hazardous work orders have not been updated in many years; they must be reviewed and revised. There are new hazards or newly recognized hazards that the Secretary's hazard orders should now address. They include protecting young workers from toxic chemicals that are probable carcinogens, reproductive toxins or endocrine disruptors, as well as new farm machinery and work practices that create ergonomic hazards. As neither OSHA nor EPA provides children under 18 with adequate protection, the FLSA's hazardous orders are an appropriate means of ensuring that young workers in agriculture are protected from these hazards.

3. Some of the hazardous orders for other industries cover equipment that is used in agriculture. These hazardous orders should be applied to agriculture to the extent that any such hazardous work may be performed in agriculture.

4. Under the FLSA, children of 12 and even younger are permitted to work in certain circumstances, whereas the normal minimum age for work in other industries is 16. The FLSA should be amended to prohibit children from working in agriculture until they are 16 years old. The only exception to this age 16 minimum should be the exception under the current FLSA provisions that allows children 14 and 15 years old to work in industries other than mining and manufacturing at these ages – namely, work by 14- and 15-year-olds is permissible only to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with the children's schooling and to conditions which will not interfere with their health and well-being.

5. In the retail, food service, and gasoline service station industries, the Secretary of Labor imposes strict limitations on the hours that children of ages 14 and 15 may work, based on findings that longer hours would interfere with children's schooling and health and well-being. (*See* 29 C.F.R. § 570.35(a).) Similar findings could be made as to the deleterious effects of excessive work on children employed in agriculture. Based on the documented hazards to children in agriculture, the restrictions in agriculture should be no less protective than those that now govern the retail, food service, and gasoline service station industries:

- not more than 40 hours per week when school is out of session;
- not more than 18 hours per week when school is in session;
- not more than 8 hours per day when school is out of session;
- not more than 3 hours per day when school is in session;
- between 7:00 a.m. and 7:00 p.m. in any day, except for the period June 1 through Labor Day when the evening hour will be 9:00 p.m.

6. The existing remedies for child labor violations – as well as those proposed by Senator Harkin – have two notable omissions. First, there is no private right of action under the FLSA for child labor violations. Hence if the Secretary of Labor does not file suit over a child labor violation, there will be no FLSA litigation. Second, none of the FLSA remedies provide any compensation to a child (or, in the case of death, a child's heirs) who suffers injury as a result of a child labor violations, for medical bills, lost wages, or pain and suffering. These two defects should be corrected by adding a private right of action provision to the FLSA which would entitle a victim to statutory damages and injunctive relief, as well as to actual damages. Similar changes should be made in state child labor laws.

7. The minimum wage protections of the FLSA and the safety provisions of AWPA do not apply to small farms which use fewer than 500 man-days of labor in a calendar quarter (i.e., employ fewer than 7 full-time workers). These small farm exemptions should be repealed by Congress.

8. Too often children work to try to help raise their families above the poverty level. To reduce child labor, the minimum wage should be increased to the level necessary to provide adult farmworkers with a living wage.

9. Annual riders to the appropriations of the Occupational Health and Safety Administration prohibit OSHA from regulating safety and health conditions on a farm unless it employs 11 or more workers or has an active farm labor camp. These annual appropriations riders should be dropped and OSHA should be allowed to require compliance with health and safety standards by all farms.

10. The OSH Act also exempts agriculture from a number of basic safety standards that have clear applicability to hazards on a farm (e.g., protection against electrocution and protection from exposure to unguarded machinery). All OSH Act standards should be made equally applicable to agriculture, where appropriate.

11. Agricultural employment is exempt from the overtime provisions of the FLSA, resulting in long hours of work farmworkers, both children and adults. This agricultural exemption should be repealed by Congress.

12. Farmworkers have no right to form unions and bargain collectively for improved wages and working conditions. This omission should be corrected by the enactment of a federal law granting farmworkers the right to organize and bargain collectively.

13. The U.S. Department of Labor has been reluctant to utilize its authority to seek a "hot goods" injunction when it finds child labor violations in agriculture. The "hot goods" remedy should be used much more frequently when child labor violations are found in agriculture.

14. Any state child labor law that exempts agricultural employment from its protections should be amended to cover agriculture. In addition, every state whose child labor protections in agriculture are less protective than the protections recommended in this listing for the FLSA should amend its laws to increase the protections accordingly.

15. States should enact statutes affording children who are injured while employed in violation of the child labor laws the option of filing a personal injury lawsuit or filing a workers' compensation claim.

16. Under current law, the health-based standard of the FQPA is used to evaluate only non-occupational exposures to pesticides. The FQPA should be amended to require that its health-based standard be applied by the EPA in evaluating the risks to young agricultural workers from exposure to pesticides in the workplace and in establishing risk mitigation measures for such young workers.

17. Currently, federal pesticide laws do not provide a private right of action. Enforcement of the Worker Protection Standard and other FIFRA requirements is left to the states, and workers injured as a result of such violations must seek recourse through workers' compensation claims or personal injury lawsuits (when those remedies are available). FIFRA should be amended to afford injured workers a private right of action for violations of this statute and the regulations issued under it.

18. All states should ensure that farmworkers are covered by workers' compensation statutes to the same extent as other workers.

19. OSHA should issue a comprehensive ergonomics standard that applies to farmworkers and that takes account of the special needs and vulnerabilities of child farmworkers.

20. The OSHA standard that requires only those agricultural tractors manufactured after October 25, 1976 to be outfitted with ROPS should be amended to require all tractors, whenever their date of manufacture, to have such protective structures.

VII. CONCLUSIONS

Contrary to popular perception, the agricultural workplace today presents many hazards. Yet children are allowed to work on farms at a young age – and even perform hazardous tasks – at a time when they are likely to lack the training, skill or maturity to handle these functions safely. The unfortunate consequence is that children working in agriculture suffer far too many deaths and serious injuries. Despite these disturbing data, few lawmakers have examined the needs of this forgotten population in the last 20 years or more. It is time to bring the law governing child labor in agriculture into the modern era and enact the protections that young workers need to keep them safe.

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